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'WEBB'S JUSTICE': THE ROLE OF SIR WILLIAM FLOOD WEBB IN THE TOKYO TRIAL. 1946 - 1948.

An examination of the influence of an Australian judge on a political trial.

TERRY HEWTON

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PREFACE

The more immediate inspiration for this thesis was Richard Minear's book, Victors' Justice (Princeton, 1971). Throughout this thesis I have assumed that Minear's general argument that the Tokyo Trial was unjust is valid and correct.

But a more long standing curiosity in me led up to this examination of Webb's role in the Tokyo Trial. Born on the day the Atomic bomb was dropped on Hiroshima my earliest recollections date from around the time of the Tokyo Trial. Even as a child I believe that I vaguely perceived that the reality of the Pacific War was at variance with the propagandist view of that conflict. The post war behaviour of my father, in particular, but also that of my other relatives and friends who had participated in the war seemed, in some indefinable way, out of tune with the heroic romanticism of the popular books and films I experienced in my early youth. These seeds of doubt were re-enforced much later in my life when I came to study modern Japanese history at Adelaide University (1966). This course left me with a still somewhat undeveloped understanding of the limitations of approaching the Pacific War from a 'them' to 'us' standpoint. In the late sixties (this was the hey day of the anti-Vietnam war protest movement on the campus at Adelaide University), I began to reject a perception of the Pacific War in terms of fixed moral categories; to reject the rigid definitions of 'immoral Japanese' and 'righteous Allies'.

My interest, then, in the role of a man who, as the President of the Tokyo Trial, attempted to come to grips with the reality of the Pacific War, arose from a more general interest in 'the true story' of Australian involvement in the Pacific War. This topic provided the opportunity of examining certain aspects of the reality of the war which served, in large measure to shape the Australia in which I grew up.

The topic of the trial is bound to remain a sensitive issue while the Pacific War is still within living memory. It would be reassuring to be able to assert that the story of Webb's involvement in the trial does not pose any threat to those who suffered for 'the cause' during Australia's war with Japan. But to do so would be less than truthful. The ideas presented in this thesis, then, are of the kind likely to be offensive to a wide section of the Australian population. Although no deliberate attempt has been made in the pages which follow to turn the tables on the generally accepted view in Australia of the morality of the Pacific War, inevitably an examination of Webb's difficulty to defining aggressive war has the effect of tending to erode the comfortable, cut-and-dried notions of the 'rights and wrongs' of that conflict. My attempt to view the war from this tragic perspective, a perspective which, by standing apart and seeing the conflict in its wider historical perspective, tends to blurr the moral categories embodied in the popular imagination, is no occasion for an apology. But at the same time, I would like to feel that my argument is being presented with a degree of sensitivity to the feelings of the generation who fought the war.

Finally, I wish to anticipate a possible criticism of this thesis; that it under-emphasizes the degree of external political pressure on Webb to conduct an unfair trial in Tokyo. This thesis is based upon the 'Webb Collection' of documents and certainly no evidence exists of any political pressure in the very hard sense to conduct the trial in such a way that the Japanese would be found guilty. Certainly some of the 'Webb Collection' remains closed to public access and it might be suggested that it is precisely such evidence of overt political pressure of a very direct nature that the authorities might deem fit to shield from public view. But such a suggestion would be purely speculative. My reading of Webb's character, however, is that he was the sort of man who would have staunchly resisted any very obvious and direct political pressure running counter to his judicial ethics. In the text of the thesis, I portray Webb as a self-willed man of strong character, and hence, I have placed a strong emphasis upon the subjective factor in Webb's behaviour in describing his conduct of a political trial.

ACKNOWLEDGEMENTS

I would like to acknowledge all those who have assisted me in the writing of this thesis. In particular, I would like to thank my supervisor, Dr. S.L. Large, for his sympathetic understanding and guidance throughout the exercise. In addition, I am extremely grateful to the staff of the Australian War Memorial, especially Mr. Bruce Harding and Mrs. Oliver for their patience and co-operation in assisting me in my study of the Webb papers. The staff of the Australian Archives, by granting me access to the materials upon which this thesis is based made the whole exercise possible.

I would add that without the reliability and competence of Mrs. Visvader, who typed this thesis from draft stage to final product, the task would have been immeasurably more difficult.

The moral and practical support provided by my wife, Julie, was greatly appreciated.

CONTENTS

CHAPTER I

INTRODUCTION

When the judicial representatives of the eleven member nations to the International Military Tribunal for the Far East met in Tokyo in 1946, to hear war crimes charges against twenty five Japanese heads of State, they were indeed conscious that they sat on the bench of no ordinary trial. The Tokyo Trial, as had the Nuremburg Tribunal before it, represented a break with long standing tradition in the post-war settlements that had followed conflicts in the past. Prior to the second World War the vanquished nation had been called to account for conventional war crimes and for civil wrongs perpetrated during the conduct of hostilities. But in Nuremburg and Tokyo 'war crime' assumed an expanded meaning. In 1946, the Japanese were called to answer for having waged the war itself.[1]

There were fifty five counts to the indictment against the Japanese. Thirty six of these represented crimes against peace. The first of these (count one) charged an overall conspiracy which developed over an eighteen year period, to secure domination of a large area within and bordering the Pacific and Indian oceans. The fifth count charged that Japan entered a conspiracy with the other Axis powers, Italy and Germany, to secure the domination of the whole world. Thirty four counts alleged particular conspiracies within the general conspiracy charged in count 1. In addition there were sixteen charges of murder and three charges of conventional war crimes and crimes against humanity.

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[1] For a breakdown of this general charge against the Japanese, see Richard Minear, Victors' Justice, (Princeton, New Jersey, 1972), pp.23-26.

Significantly, the various specific charges in the indictment all represented aspects of one central crime - that of having waged aggressive war.

There was an element of naivety on the part of the framers and participants in the trial in assuming that aggressive war was a justiciable issue. In fact 'aggression' as it applied to the behaviour of nations towards one another, was impossible to define in any widely accepted sense.[2] The issue of aggression was as much a political and philosophical issue as it was a purely legal one. If the judges had been able to define aggressive war they would have had insights into fundamentals of human existence unique in human experience. Prior to the second world war no attempts had been made to charge a nation with having waged war following a conflict. The issue was considered non-justiciable. But, with the cessation of hostilities in the European and Pacific theatres of war, it had been decided to outlaw war in general terms. It was this which lent the trial, in its intention, an epic significance.

The theory behind the trial was really a re-application of the peace aims that had failed to succeed after World War I translated into judicial terms.[3] The trial was set up as a

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[2] Minear, Victors' Justice, pp.55-60.

[3] Hence the reliance of both the framers of and the participants in the Tokyo Trial on the Kellog-Briand Pact of 1928 in enunciating the aims and philosophy of the Tribunal. Minear cites the opening address of Robert H. Jackson, American Prosecutor at Nuremburg. In part this reads: 'The "forces of law and order" must be "made equal to the task of dealing with ...international lawlessness". This task can be met by taking two steps; by incorporating the Pact of Paris...into formal international law, and by establishing the accountability of political leaders before international law'. The ideals stated by Jackson at the commencement of the Nuremburg Tribunal, applied also to the Tokyo Trial.
Minear, Victors' Justice, p.12.

civilized alternative for force per se in creating a peaceful world order. The Pacific war had ushered in the age of nuclear war and the nightmarish prospect of total war fought with nuclear weapons. The need for a civilized alternative to force in creating the new world order was urgent. It was, in part, a recognition of the principle that force begets force. It was an attempt to abandon the 'might is right' philosophy that had prevailed in the past and to establish reason as the guiding force in international relations.[4] It was a truly noble aim, but was impractical. The idealists saw the trial as more than just an act of faith, more than merely an affirmation of certain uniformly held fundamental principles of civilized behaviour amongst nations. The trial was to implement the ideal, to give it concrete formulation in legal language. It was to set up a mechanism for international social justice that would last into perpetuity.[5]

It is vital to understand this in terms of the monumental task that this set for the judges of the Tribunal, for it was their task, primarily, to implement justice. They were summoned from their respective countries to bring a wisdom and judicial experience to bear on a problem of enormous proportions. The task before the judges at the trial had a utopian quality about it which was out of tune with the grim realities of the post war world.

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[4] Minear, Victors' Justice, p.12, para. 2.

[5] Jackson's opening address cited in Minear, Victors' Justice, p.11, para. 2.

The judges failed in their epic task. They conducted a trial which implemented a 'Victors' justice' which fell far short of the high sounding ideals of justice that had heralded the trial's commencement.[6] The bench in Tokyo was not made up of pragmatic philosophers in command of great truths on peace and war capable of implementation. In fact, even on a more down to earth plane, the bench has been found wanting by a student of the Tribunal.

> The personnel of the Tribunal, while trained in the law of their respective countries were not necessarily the top legal talent available. They were truly able men but not superior legal authorities. One does not with impunity criticize the men and their abilities but one does believe that in a trial of this kind only the best legal talent should be utilized. [7]

Certainly less elevated motives were operating in the setting up of the Tokyo Trial. As Minear has pointed out, the reverse side of the coin of Japanese criminality, was the rightness of the course pursued by the Allies during the war.[8] This did not follow as a matter of strict legal logic, but as a propagandist exercise, that could have been and was, as events transpired, the effect of the Tokyo Trial.[9]

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[6] Minear, Victors' Justice, pp.10-13.

[7] Walter Lee Riley, The International Military Tribunal for the Far East and the Law of the Tribunal as revealed by the Judgement and the Concurring and Dissenting Opinions, (Ph.D. dissertation, University of Washington, 1957), p.198. A microfilm copy is held in the National Library of Australia, Canberra.

[8] Minear, Victors' Justice, p.13.

[9] See Chapter IV of this thesis for a discussion of the way in which, in Webb's mind at least, exoneration of the Japanese in their conflict with Australia, New Zealand and the Netherlands, implied as a matter of strict logical necessity, the guilt of the three allied nations involved in that conflict.

Purely subconscious ulterior motives too were in operation in setting up this major war crimes trial. Beneath the high sounding phrases lay a primitive desire for vengeance to administer 'an eye for an eye', harsh form of justice upon the vanquished.[10]

It was the operation of ulterior motives which, arguably, resulted in a political trial. The trial, it can be argued, was not a sincere exercise in that, at worst, the Allies allowed the vanquished the rigmarole of due process of law but only as a facade which masked a real desire to punish the defendants and otherwise further the selfish interests of the victor nations. The strongest criticism that can be levelled at the trial is that it was a cynical, propagandist exercise in this way. At best, on the other hand, it could be argued, the Allies had intended to be just in their treatment of the Japanese but had been unable to rise to the task and had failed to overcome a bias against the Japanese.

The truth is that both extremes were present.[11] The motives so far described, both conscious and subconscious, included those which were political only in the broader sense. It is possible, also, to see conscious political motives in the narrow sense in operation too. According to Lord Hankey, the defense at the trial was not allowed to introduce evidence

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[10] The defence, in their appeal to General MacArthur against the verdicts handed down by the Tribunal stated, 'The verdict looks too much like an act of vengeance to impress the world with our love of justice and fair play'.
'Defence Appeal to General MacArthur', cited in Minear, Victors' Justice, p.207.

[11] Minear makes the point that a mixture of 'lofty' and 'low' motives existed in the setting up of the trial.
Minear, Victors' Justice, pp.11-19.

of Soviet aggression out of 'deference to Soviet susceptibility'.[12] That is to say the Russians exerted influence to exclude from the trial evidence that could have been politically embarrassing to them. Likewise, the decision not to indict Emperor Hirohito was taken out of political rather than purely legal considerations.[13]

The charge of political trial rests squarely on the shoulders of the judges for they were primarily responsible for the conduct and the outcome of the trial. And the man most responsible was Sir William Flood Webb, former Chief Justice of the Supreme Court of Queensland, and appointee to the High Court of Australia, for he was the President of the trial. In 1946, Webb had been appointed by General MacArthur as the Australian representative on an eleven member Allied bench.

Why did the judges fail in their epic task? What were the factors which led the judges to conduct a political trial? There is no straightforward answer. This thesis will attempt to answer the question with respect to just one judge - Sir William Webb.

Webb was one judge in eleven, but in understanding Webb's failure to perceive a practical ideal of true justice we can go a long way towards an understanding of the total failure of the Tribunal. Webb was the most important single influence on the bench. As such his perception of aggressive war, the central issue before the court and his behaviour in conducting

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12 Lord Hankey, Politics, Trials and Errors, (Chicago, 1959), pp.142-143. Mention of the exclusion of evidence relating to Russian aggressions was included in 'the points advanced in the protest of American Counsel for Defence against the unfairness of the Tokyo Trials'.

13 See the discussion of the political influences on the bench in Chapter III of this thesis.

the trial, were the paramount influence in the trial. It will be the primary purpose of this thesis to examine Webb's role on the bench in its effect in producing 'victors' justice', in order to throw light upon the process whereby the Japanese suffered an unjust trial at the hands of their conquerors.

Inevitably, Webb's failure to conduct a just trial was Australia's failure also. Webb was officially Australia's representative on the bench. But more than this, he was a product of the Australian society at the time. At a deeper level in Webb's consciousness, Webb's perception of war and peace in the international world order, was a shared perception. Indirectly, through Webb, we can gain some insight into the Australian notion of 'just war'. This thesis will not focus upon Australian perceptions of war and peace in the international community - that arises incidentally from an examination of Webb's own perception of aggressive war in the particular context of the Pacific war. But the study of Webb can point the way for other studies seeking a broader understanding of the Australian world view in the early years of the cold war.

Perhaps the most damaging criticism which has been levelled at Webb himself at the trial is that he was personally biased against the Japanese at the trial. Bias is central to the claim that Webb participated in a political trial. Webb had investigated Japanese atrocities committed during the war prior to the trial,[14] and so, it was argued at the commencement of the proceedings, that Webb was biased on that score against the Japanese defendants.

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[14] See discussion of this investigation in Chapter II of this thesis.

'Bias' in this sense refers to a subconscious inclination against the Japanese of a relatively superficial nature. Investigating Japanese atrocities, it could be argued, must have been a highly emotional experience, likely to produce in Webb, a 'grudge' against the Japanese.

The charge of bias has not been levelled exclusively at Webb. The Tribunal in general and particular members of the Tribunal, have been likewise criticized on the grounds that they were biased.[15] Such criticisms introduce a more fundamental notion of bias than that cited above.

Minear sees bias in this fundamental sense, as the most basic reason for the failure of the Tokyo trial to fulfil the high ideals of justice enunciated in the setting up of the Tribunal.[16] In this way, Minear mitigated his criticism of the principal figures in the Tokyo Trial. In the preface to his book, after stating that notwithstanding the strength of his criticism of those most responsible for the trial, that he was not seeking to make these men scape goats, Minear said:

> The major share of the blame for the Tokyo Trial lies with the assumptions, the world view, all these men held in common. [17]

The men referred to were MacArthur, Keenan and Webb. Minear endorses Professor Hall's statement:

> We need to re-think the causes of the Pacific war from what can only be described as a tragic view, one which takes no comfort in scape goats and offers no sanctuary for private or national claims of moral righteousness. [18]

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[15] Minear, Victors' Justice, pX.
[16] Minear, Victors' Justice, pX.
[17] Minear, Victors' Justice, pX.
[18] Minear, Victors' Justice, pX.

In other words, we need to do now what the principal participants in the Tokyo Trial were unable to do in the immediate post war years; to re-think our basic assumptions of the total world order, as it existed then, and as it exists now.

In fact the very wording of the indictment implied a fundamental bias against the Japanese on the part of the victor nations. The Japanese were charged with waging

> aggressive war against the United States of America, the Republic of China, the United Kingdom of Great Britain and Northern Ireland, the Union of the Soviet Socialist Republic, the Commonwealth of Australia, Canada, the Republic of France, the Kingdom of the Netherlands, New Zealand, India, the Commonwealth of the Philippines and other peaceful nations. 19

The irony in labelling the 'victim' nations bringing the charges as 'peaceful nations' in this way was acute. The Japanese had not set foot in France or Great Britain or Holland. But they had forcefully entered the possessions or former possessions of those countries.

To quote Sir William Webb's comment on British imperialism, and apply it in a broader context with the same sense of irony, European expansion in the nineteenth century had not been 'wholly the result of peaceful negotiation'.[20] This was bias which existed at a deep seated level in the minds of the framers of the trial. It was a bias which assumed the rightness of European imperialism in the nineteenth century and which decried Japanese imperialism in the twentieth century.

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19 Record of Proceedings of the International Military Tribunal for the Far East, Tokyo, Japan; The United States of America (and others) against Araki, Sadao (and others) accused. (Tokyo 1946-48). On microfilm in the Barr Smith Library (Adelaide), Mf 3093-3129.

20 Sir William Webb, Introduction to David Bergamini, Japan's Imperial Conspiracy, (London, 1971), pxii.

Webb's role, then, needs to be examined to see whether Webb was biased against the Japanese in both the superficial sense of bias and in the more fundamental sense of that term.

To contemplate Webb as biased in his role at the trial presents something of a paradox. It is, prima facie at least, to see him behaving very much out of character as we shall see later in this thesis. Webb took the impartiality of his role very seriously indeed. But there can be no doubt, on the other hand, that Webb influenced the Tribunal in a way which tended, in terms of Minear's argument, to produce an unjust result. The evidence on Webb's role at the trial makes it clear that he did not lower his standard of justice and so the question remains; in what way did a man who attempted to be eminently just in his approach contribute so much to a political trial?

According to David Bergamini, Justice Pal of India dissented entirely from the majority judgement of the Tribunal because he was fundamentally inclined, in his outlook, towards the Japanese point of view:

> Justice Pal of India, whose land had not been overrun and who shared in the Buddhist religious heritage of the Japanese, dissented entirely because he could not see his way clear to condemning Japan for having waged war on the West. 21

The bias referred to in Pal here describes a subconscious inclination in Pal towards the Japanese which stemmed from Pal's cultural heritage, part of which was shared by the Japanese.

In fact all eleven judges brought with them certain preconceived notions that formed part of their in-built cultural heritage. All had been moulded by the milieu of

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21 David Bergamini, Japan's Imperial Conspiracy, p.182.

their respective national and cultural environments. It is against the broader background of each judge's cultural context that we must interpret the individual notions of justice put forward by each at the time.

This thesis is primarily concerned to elucidate Sir William Webb's notion of justice, both in its application to the Japanese defendants and in its broader aspects as well. Webb clearly was a product of his Australian environment and so in order to fully understand his concept of justice in relations between nations, it is necessary to understand the nature of Webb's environment. In particular, it is the intellectual and emotional components of that environment that most bears examination, for the question must be asked; To what extent were the fundamental assumptions on the Pacific war shared by all Australians, important in understanding Webb's behaviour at the trial? To what extent was Webb able to adopt an individualist approach to the conduct of the proceedings and in his contribution to the findings of the Tribunal?

The identification of and separation of Webb's Australian identity and his personal identity is an important method of arriving at an interpretation of Sir William's behaviour in Tokyo.

It is therefore appropriate in this chapter to examine briefly those Australian fundamental attitudes which tended to produce a particular feeling or inclination when brought to bear on the morality of the Pacific war, before moving on in later chapters of this thesis to decide the extent to which such attitudes were shared by Webb and influenced his thinking on aggressive war at the trial.

An Australian cultural bias against the Japanese in the Australian public at large, both at the time of the trial, and since, can be easily identified. This bias is to be distinguished from a more superficial and emotional response to the Japanese that was prompted, for example, by reports of Japanese atrocities, though the two are related. The fundamental cultural bias against the Japanese in their role in the Pacific war stemmed, basically, from an acceptance of a white European-derived Australia in a coloured Asiatic geographical context.

Douglas Cole's article, 'The Crimson Thread of Kinship',[22] is of particular relevance in arriving at a basic understanding of the Australian idea of guilt and innocence as it applied in the context of the Pacific war. Cole's article presents a detailed analysis of Australian ethnocentrism as it operated around the turn of the nineteenth century. Although the article is concerned with a period of time which pre-dates by several decades, the immediate post war period, the essential notion of ethnocentrism as it is described by Cole, is applicable to this thesis.

Ethnocentrism is defined by Cole as,

> the belief in the unique value and rightness of one's own group, an approval of one's fellows and their ways, and an aversion and contempt for outsiders and their ways. 23

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[22] Douglas Cole, 'The Crimson Thread of Kinship; ethnic ideas in Australia, 1870-1914', Historical Studies, No. 56, (1971).

[23] Douglas Cole, 'The Crimson Thread of Kinship', p.511.

In the same passage, Cole further elaborates the meaning of the term:

> This 'natural' sympathy for kind and aversion of difference is used as a weapon, serving the group in its struggle to maintain power, status or wealth. By focusing attention on cultural differences, it strengthens the group's cohesion and the approval of the group's folkways. Functionally, ethnocentrism enforces loyalty to the group, strengthening its solidarity in conflict with a threatening group. This functional ethnocentrism fluctuates, therefore, with the degree of contact and competition and the extent of cultural divergence. In times of stress, it may be deliberately invoked with the in-group elevating its conception of itself as superior in morality, ability, and general development and accusing out-groups of lesser morality, lower development and, where possible, biological inferiority. 24

Cole identifies three main strands to Australian ethnocentrism around the turn of the century.[25] The primary strand was the most general and laid stress upon the superiority of the white race of Australians. A second strand operating at an intermediate and a more selective level, was Anglo-Saxonism. The Britannic ethnocentrism strand stressed the superiority of the British racial stock and the common identity of Britons geographically located in England, and Australians. The third strand had its roots in the recent history of Australia at the time. It stressed the superiority of the 'native born' Australian of European origin. It was this strand which lent psychological force to Australian nationalist feeling at the time of the birth of the Australian nation.

Now it is not the Australian ethnic ideas themselves which have relevance for this thesis, but the notions on the morality of war which stemmed from them. Any examination of Australian

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[24] Cole, 'The Crimson Thread of Kinship', p.511-512.

[25] Cole, 'The Crimson Thread of Kinship', p.511.

fundamental assumptions on the Pacific war must begin with an examination of Australian ethnocentrism because it was this social phenomenon which was the intellectual and emotional mainstream from which Australian thinking on the place of Australia in the world order, and more particularly the Asian sphere of that order, sprang. Consequently, the Australian ethnocentric ideology has a direct bearing on the way in which Australians perceived the nature of the Japanese threat during the Pacific War.

It is important to understand that each of the above mentioned strands of Australian ethnocentrism was not mutually exclusive. They,

> blended easily and emphasis flowed from one to another because they expressed facets of a more or less consistent ethnocentric ideology. 26

It seems reasonable to assume then that by the time of the war, as Australian nationalist feeling strengthened in the first half of the twentieth century, there had been a relative increase in the belief in the superiority of the native born Australian and a relative diminution of the Anglo-Saxon component to the Australian identity. It seems likely, too, that the same period of time saw some degree of lessening of the strength of Caucasian racism, since the overt racism which focused upon the colour of a man's skin as a mark of inferiority waned as the century progressed in favour of more subtle forms of white Caucasian racism.[27] The relative

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[26] Cole, 'The Crimson Thread of Kinship', p.511.

[27] Humphrey McQueen discusses the subtle versions of Australian racism that exist currently.
See Humphrey McQueen, Aborigines, Race and Racism, (Australian Connexions), (Victoria, 1974), p.14.

strength of each strand of Australian ethnocentrism by the time of the war and the immediate post war years is not of great relevance in understanding Australian attitudes towards the Japanese in the Pacific war. The main point is that there was a 'more or less consistent ethnocentric ideology' prevailing shortly after the war which was an extension in time of the ethnocentric phenomenon identified by Cole as existing around the turn of the century, and which was the significant fundamental factor in determining Australian thinking on the role of the Japanese in the Pacific war.

Of particular relevance was the Anglo-Saxon strand. Australians perceived themselves as belonging to a white European, predominantly Anglo-Saxon outpost in a potentially hostile and less civilized Asia.

In this way ethnocentrism, especially in its emphasis upon kinship between Australians and Britons, led to a belief in the solidarity of the British Empire. It was both at the same time a belief in a positive ideal,[28] that ideal being represented by a belief in the Empire established by Britain as having accomplished something close to an ideal state of affairs, and an acceptance of the British hegemony - an inability to easily conceive of an Asia not dominated, in part, by Britain.[29]

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[28] Numerous examples exist in the literature of the pre-war and immediate post war period to illustrate the belief in empire as a positive ideal. One example is to be found in a school text in use in South Australia during the war. Walter Murdoch, The Struggle for Freedom, (Melbourne, 1911), pp.102-111. On p.103, Murdoch says, '...in the whole history of our struggle for empire no episode is so glorious as the conquest of India'.

[29] The phrase 'The sun never sets on the British Empire' has been echoed in Australia. This phrase seems also to imply that the British Empire was part of the natural order of things. The phrase denotes a pride in empire first, but it also indicates an acceptance of the British Empire on the part of Australians - of the broad geographic and political context in which they were placed.

The feeling of solidarity in Empire was not confined to that established by Britain. Partly by virtue of the white Caucasian strand to the basic ethnocentric outlook, Australians felt a certain kinship with all other European empires in Asia. It was a feeling which bolstered a feeling of kinship between Australians and other European colonizers and again it was partly a positive belief in an ideal, a positive belief that say the Dutch empire was a morally good, a civilizing influence in Indonesia, and partly an acceptance of a European dominance in the Pacific area.

In this way ethnocentrism produced certain strong feelings and thoughts on empire - a particular view of European imperialism of which Australia was an integral part. To say 'Australia' was to automatically imply in the minds of most Australians, an Australia conceived of as part of the British Empire and standing in close relation to other European empires in the Pacific, as opposed to the native populations of those areas.

In this way ethnocentrism, in its emphasis upon the solidarity of the white Caucasian Anglo-Saxon derived group of Australians, led to a short sighted perspective on the whole process of imperialism throughout history. The Japanese conquest in the Pacific was not seen as a follow-on from nineteenth century European conquest in the same area and neither two sets of conquests were seen against a long line of conquests in Asia and Europe stretching back over the centuries. Of course, an inherent tendency to focus a perception of any state of affairs on the present is a human failing, but this failing was reinforced by the white, Anglo Saxon ethnocentric strands. Essentially this myopia lay behind

the belief in most Australians that the Japanese offensive in the Pacific had been immoral, even before they embarked upon any piecemeal consideration of the methods used by the Japanese to achieve an empire, methods which were considered by the Australian public to be uniquely barbarous in the history of the world.

It had been the failure of the historical imagination in large sections of the Australian public that had led to widespread acceptance of Australia's involvement in the Imperial wars that preceded the Pacific conflict. Australians at the time of the Boer War and the first World War, by virtue primarily of the Anglo Saxon strand to Australian ethnocentrism, saw the defence of Australia and the defence of the British Empire as one and the same thing.[30] Australia's destiny and that of the British Empire was, in the Australian mind, indivisible. Certainly, the dramatic split in the Australian nation's sympathy over the conscription issue during the first World War, could be seen as implying a weakening of the Britannic ethnocentric strand early in the twentieth century. Still, by the time of the second World War, the belief that a threat to Britain was in some sense a threat to Australia as well remained widespread.[31]

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[30] According to Barbara Penny, most Australians supported Britain's stand in the Boer War because 'the war was a war between Britons and Boers and Australians were Britons'. Barbara Penny, 'The Australian Debate on the Boer War', Historical Studies 56, (1971), p.537.

[31] The way in which the Australian Government identified itself with Great Britain is indicated by the announcement by Sir Robert Menzies in 1939 that Australia was at war with Germany. 'It is my melancholy duty to inform you officially that, in consequence of the persistence by Germany in her invasion of Poland, Great Britain has declared war on her, and that, as a result, Australia is also at war'.
O.W. Hunt and K.W. Marshall, Australia Since 1900, A Study of Australia in the Twentieth Century World, (Sydney, 1965), p.146.

Australians have, too, in the past seen a threat to any European nation by an outside (i.e. non-European) force as being a threat to Australian civilization. And so, as a result of the Russo-Japanese War (1904-1905)

> a few in Australia had predicted that the day would come when the Japanese would threaten the survival of European civilization in Australia. 32

An effective measure of the strength of the Anglo Saxon ethnic strand and its effect upon the attitudes of Australians to their place in the Pacific world order is provided in the content of educational courses throughout the first half of the century. The majority of schools in that period were State and Protestant schools and the values that these schools both propagated and reflected were the values predominant in the community. During the last three decades of the nineteenth century, according to C.M.H. Clark, the Protestant and State school student was brought up 'to believe in the contribution of the British to the freedom of men and the progress of the world'.[33] The schools of that time propagated and reflected a basically Protestant view of the world in the broadest non-sectarian sense of that word. These values were held by the

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[32] Manning Clark, A Short History of Australia (Australia, 1963), p.216. Clark traces the Australian fear of a Japanese attack from the Russo-Japanese War (1904-1905) to 1935.

[33] Clark, A Short History of Australia, p.149. See also an article by S.G. Firth, on the social values reflected in N.S.W. Primary Schools at around the same period. On page 128 of this article, Firth describes N.S.W. Public School values. 'Its world was one of certainty about the British Empire, British military might, pride of race, honour, duty, self sacrifice, the Victoria Cross, God, General Gordon, hard work, the flag, wattle, the poor savages, Shakespeare, noble deeds, adventure, exploration, heroes and, in the end World War I'. In this one paragraph summary of public school social values the three main strands of Australian ethnocentrism can be identified. S.G. Firth, 'Social Values in New South Wales Primary School 1880-1914: An Analysis of School Texts', Melbourne Studies in Education, (1970).

wider Australian community in the decades leading up to the turn of the century. Most Australians of that time were motivated at the most fundamental level, by the bourgeois liberal idea. They believed in the superiority of British political institutions and the pursuit of material progress. The basic social and philosophical assumptions of that period continued into the following century and prevailed during the war and after.[34]

These broad underlying assumptions produced a particular conception of Australia's place in the world order. In the educational system of the early twentieth century the world order was that put forward in such texts as 'Deeds that won the Empire'.[35] Another text used in schools, originating early in the twentieth century and still in use during the second World War, was The Struggle for Freedom by Walter Murdoch.[36] The world view that the book presented was a British world view. This book epitomized the values that Clark says typified those of State and Protestant schools late in the previous century. It is worth a close look at the underlying imperial assumptions of that book because in

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[34] This is clear from an article written by Clark in the nineteen fifties. Manning Clark, 'Re-Writing Australian History', in T.A.G. Hungerford (ed), Australian Signpost (1956), pp.130-143. On page 130 of this article, Clark said 'One of the convictions of the majority of educated people in, say, England or Australia, is that British political institutions and the Protestant religion were the creators of political liberty and material progress'.

[35] Clark mentioned this book in his article. Clark, 'Re-Writing Australian History', p.134. A copy of 'Deeds that won the Empire' is held in the library of Wattle Park College of Advanced Education (S.A.).

[36] Cited above. A copy of this book is in my possession and was given to me by a Mrs. Green (now deceased) of Adelaide.

so doing we can obtain an accurate perception of the thinking of the generation of Australians who fought the war and settled down after the war secure in the belief that they had conquered an evil and dastardly enemy in the Japanese.

Chapter XII ('The Struggle for Empire') of Murdoch's book,[37] had an ironical ring to it when it is considered that the ideas contained therein would have been generally acceptable to the war time population in Australia. Under the sub heading, 'The Need for Expansion' the chapter began

> History is full of struggles. We have traced the struggle of the British people for liberty - for freedom to govern themselves; we now turn to their struggle for Empire - for freedom to expand beyond their island's boundaries. [38]

The assumption of this passage, an assumption shared by the readers of his book at the time, was one which elevated expansion beyond a country's border to the status of a civil liberty. The introduction to Chapter XIII continued on the same page to justify England's expansion in terms of the practical necessity of a small nation geographically needing to find:

> in other parts of the world secure homes for her overflowing population, or to find new outlets for the trading by which her home population is fed.

The irony of such a statement in a context in which the immorality of Japanese conquest was assumed, is obvious. It was an irony lost on the Australian population at large at the time.

Ethnocentrism had produced, by the time of the war, a long standing fear of invasion of Asians, in vast numbers,

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[37] Murdoch, The Struggle for Freedom, pp.102-111.

[38] Murdoch, The Struggle for Freedom, p.102.

southwards on to Australian shores. Words such as 'hordes', 'swarms', 'flood', 'on rush','overrun' were used to describe the numerical strength of potential enemy to the North. It was an irrational fear which had its roots deep in Australian history. The fear hearked back to the Chinese presence in Australia, especially on the gold fields and the anti-Asian racism that this engendered. It was directly linked with the motivation to create a white Australia. Australians could not point to any substantial logistic or strategic reason for their anxiety. Scholars have sought the reason for what may be seen as a neurotic fear of a threat to the North. One explanation has been put forward by Humphrey McQueen in his book Aborigines, Race and Racism.

> Australians have applied the law of gravity to international relations and argued that what is up must come down. On this basis they have assumed that it is only natural that Asians should want to invade Australia.
> All the Asians have to do is to slide down the map. There is no reason to consider 'north' as being 'up'. Indeed to look at the world from the stand point of an Asian the tip of Cape York points aggressively at China. 39

If this relatively simple explanation of the Australian fear of Asians has any truth in it, it will be because the ethnocentric phenomenon has led Australians, as a white European group, to cohere tightly in the face of the proximity of an alien group, ethnically and culturally very different. That is to say, the 'law of gravity' theory cannot be seen as a complete explanation in itself but must be considered as a manifestation of Australian ethnocentrism.

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39 Humphrey McQueen, Aborigines, Race and Racism, p.14.

Whereas an ethnocentric bias existed against Asiatics in general in Australia in the pre war years, the Japanese thrust southwards served dramatically to intensify this bias. The intensification of this bias resulted partly from the deliberate policy of the Australian Government. The Pacific war provided a 'stress situation' in which the superiority of the Australian race over the Japanese race was deliberately invoked by the Australian authorities as part of their strategy to boost morale in the Australian public to the degree of pitch necessary to fight the war.[40] Partly from a carry over from this, Australian ethnocentrism in the immediate post war years, operated in the maintenance of a short sighted hatred of the Japanese.

In the decade or so following the war, Australians experienced a flood of post war propagandist books and films which perpetuated a fundamental racial bias against the Japanese. One such book was Rohan Rivett's Behind Bamboo,[41] a book about the experiences of Australian prisoners of war in Japan during the war. In the opening statements to Rivett's book, the three main strands to Australian ethnocentrism are clearly evident. The first paragraph of the book echoed the long standing fear of Asian hordes descending onto Australia, as if by the force of gravity.

> The great on rush of the Japanese hordes at the outbreak of the Pacific war submerged southern Asia and the islands which stud the sea between Asia and Australia. In those lands thousands of men, who strove in vain to dam the flood, were overwhelmed, slain, or carried into captivity. 42

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[40] An excellent illustration of this fact is to be found in the anti-Japanese propagandist poster reproduced in McQueen's book. McQueen, Aborigines, Race and Racism, p.14.

[41] Rohan Rivett, Behind Bamboo, (Sydney, 1952).

[42] Rohan Rivett, Behind Bamboo, p.VII.

On the same page we can see Anglo Saxonism blend with a belief in the racial superiority of the Australian native. Rivett quoted Winston Churchill to explain away the defeat of the Australians despite their racial superiority over the Japanese.

> In barbarous times, superior moral virtues - physical strength, courage, skill, discipline - were required for seizure of a supremacy; and in the hard evolution of mankind the best fitted stocks came to the fore. But no such guarantee exists today. There is no reason why a base, degenerate, immoral race should not make an enemy, far above them in quality, the prostrate subject of their caprice or tyranny. 43

This illustrates the degree to which Australian ethnocentric assumptions could produce an illogical and extreme bias against the Japanese in the emotional atmosphere which existed in Australia shortly after the war. A belief in the racial qualities of the native Australian and those of the Briton merged in Rivett's book to produce a conscious rationalization for the defeat of the Australian forces in Singapore. This was really a perversion of the survival of the fittest argument and the fallacy in the reasoning is obvious. It was in fact, an inversion of the Darwinian concept put forward on the flimsy basis that the latest weapons and devices in modern warfare will allow an otherwise inferior group to predominate over one which is superior. Ethnocentrism, as it manifested itself in Rivett's book, rested upon racist assumptions of their crudest form. In Rivett's mind the 'crimson thread of kinship' linked Australians with Britons in a blood bond far superior in quality to that of the Japanese race.

Further into the introduction, Rivett's racism became even more blatant.

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43 Rohan Rivett, Behind Bamboo, p.VII.

> The captor, scorning all international agreements...now revealed the naked beast beneath the thin civilized veneer which he had so recently assumed. 44

This was racial prejudice based upon a belief in the superiority of the white skin. It was directed not only to the Japanese but to Asiatics in general. Rivett continued in the same passage

> Every humiliation was imposed upon the captives to degrade them in the eyes of the local Asiatic populations. 45

The implication here was that the humiliation of the Australian captives was all the worse because it involved a loss of status relative to that of Asians generally.

Such then were the assumptions shared generally by Australians about Australia's place in the world order generally and in the Pacific in particular. In their sharper focus ethnocentric assumptions produced an automatic assumption, an inbuilt reaction to the Japanese role in the Pacific war.[46] Of course these assumptions were not shared to the same extent by all Australians. But, to a greater or lesser extent the subconscious beliefs underlay the thinking of the time.

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44 Rohan Rivett, Behind Bamboo, p.VII.

45 Rohan Rivett, Behind Bamboo, p.VII.

46 Interestingly, Walter Murdoch, the author of The Struggle for Freedom, cited above, is quoted on the front flap of the edition of Rivett's book, as saying, 'I don't want a word altered. I have no doubt that the book will be one of the few classics of the war...'
In Murdoch's wholehearted approval of Rivett's book, we can read a link between those fundamental imperial assumptions discussed above in connection with Murdoch's book and those ideas held by the Australian public at large on the morality of the Pacific war. If Murdoch and Rivett had not shared a fundamental acceptance of a white European hegemony in the Pacific, Murdoch would hardly have been so enthusiastic in his approval of Rivett's book.

These same assumptions prevail to the present day, though in the more enlightened intellectual climate of the 1960s and 7Cs an increasing objectivity has been dispelling some of the illusions held by Australians generally about the war.

It is precisely because a fundamental imperial bias against the Japanese in their role in the Pacific war, persists to the present day that the Japanese outlook during the war is not easily understood by Australians. It is therefore helpful to contrast a statement of the Japanese viewpoint on the morality of imperialism with the imperial assumptions of the Australian public ar large, as it existed during and after the war, right up to the present day. This can serve for Australians whose vision is clouded by the very bias that they may seek to understand, to throw Australian pre-conceptions on the morality of the Pacific war, into relief.

Joe Rich in his book Asia's Modern Century[47] quotes a Japanese militarist on the hypocrisy of Western critics of Japan's war aims. This passage presents the opposite of those imperial assumptions held by Australians at the time of the trial and still held by them today.

> What moral right do they who have themselves closed to us the two doors of emigration and advance into world markets, have to criticize Japan's attempt to rush out of the third and last door? If they do not approve of this they should open the doors which they have closed against us and permit the free movement overseas of Japanese migrants and merchandize... If it is still protested that our actions in Manchuria were excessively violent, we may wish to ask the white race just whose country it was that sent warships and troops to India, South Africa and Australia and slaughtered innocent natives, bound their hands and feet with iron chains, lashed their backs with iron whips, proclaimed those territories as their own and still continue to hold them to this day. 48

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47 Joe Rich, Asia's Modern Century, (Victoria, 1974).

48 Joe Rich, Asia's Modern Century, p.132.

This is the reverse side of the coin of white imperialism which is generally hidden from view in the white imperialist countries. It is hidden from view not so much as a propagandist exercise, though this is part of the reason for a one sided perception of Western imperialism. It is the attitude of mind, the subconscious bias, which limits a balanced perception of European imperial conquest.

Even Rich's book, which achieves a fair standard of objectivity, is still limited by a Western imperial bias, notwithstanding his express acknowledgement of the hypocrisy in Western criticism of Japan's war aims. The Dutch, according to Rich 'colonized' the East Indies.[49] Whereas he has a subheading in Chapter 23 'Aggression in China',[50] referring to Japanese moves in China, there is no heading or subheading 'Aggression in the East Indies' in the Indonesian chapters, or 'British Aggression' in the Indian chapters of his book. This inconsistency does not amount to a major criticism of Rich's book, but neither is it hair splitting in this context. The point is that Rich's book is typical in its deep seated bias of current Australian imperial attitudes. If academic histories are biased in this way it is likely that a general bias of this kind exists in the general community to an even greater degree. The Australian community has still not progressed in objectivity in relation to the imperial bias to the point where it would comfortably accept chapter headings such as 'The Indian War of Self Defence' (the Indian Mutiny),

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[49] Rich, Asia's Modern Century, p.62 'The Dutch began to colonize the Indonesian Archipelago in the seventeeth century...'

[50] Rich, Asia's Modern Century, p.128.

or 'Self Defence in South Africa' (the Zulu Wars). In our literature, generally speaking, although the Indian and Zulu point of view may be discussed, in the general context of Australian historical thinking, the feeling somehow exists that the Indians and the Zulus were the aggressors in their conflicts with their white European masters. In this sense then Australians did, and largely still do, view the Pacific war from the stand point of their pre-conceived notions. What remains now is more an acceptance of the European hegemony in the Pacific as it was, prior to the war rather than the positive belief in the ideal of empire. To that extent Australian ethnocentrism still acts as an obstacle, in the form of a largely subconscious imperial awareness, to an objective view of the morality of the war. The point is of vital significance to this thesis since my purpose here is to evaluate the judgement of one man, Sir William Webb, of the legal morality of the Japanese involvement in the Pacific war. It is necessary therefore for this thesis to establish a criterion which itself transcends any ethnocentric imperial awareness. The methodological philosophy of this thesis is that advocated by Professsor Hall quoted earlier. This thesis will itself have to, in evaluating Webb's role at the trial, rise above ethnocentric assumptions about Australia's place in the world.

The trial raised questions that called for answers running directly counter to the comfortable assumptions of Empire and war held by Australians at the time, and that are still generally held today. To that extent, Webb had been called upon to perform a potentially subversive role. For to have adopted an unbiased approach in terms of the Australian

fundamental ethnocentric awareness would have produced conclusions that ran counter to a fundamental national ideology. It is likely that this is the reason why the trial has been largely neglected as a topic of study by Australian scholars. It has been assumed that the trial was a just one and Australians have been reluctant to upset their own complacency.

To examine the pros and cons of the Japanese offensive is an uncomfortable exercise precisely because it calls into question some of the most basic assumptions about Australia's place in the world order. If that is the case today it was even more true at the time of the trial.

Indeed it seems likely that a sense of disillusion followed the trial amongst those top officials in Australian society that had been directly involved in some way in the proceedings. For the results of the trial and the fundamental issues that it raised have not been incorporated into the public historical memory. Those who were aware of what happened in Tokyo were not willing or not able to make the trial public knowledge. And so Minear's comment[51] that few Americans know much about the trial applies in Australia as well. It is not surprising that, in the immediate post war years in Australia, at least, the public that had suffered so much during the war was unreceptive to philosophical relection on the morality of the war.

Perhaps a sense of failure underlay the official pronouncements of the trial at the time, because they and the trial generally were soon dropped from the Australian public awareness. Certainly, as will be shown later in this thesis, a sense of unease characterized Sir William's

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[51] Minear, Victors' Justice, p.IX.

judgement. One sided though the trial was, the judges on the bench were unable to provide the sort of assurance that the international public wanted to hear. In a unique way the bench was made the victim of a public desire for a restoration of stability and order, for a new order to follow the one that had been destroyed by the war. But, the fulfilment of such a public desire by the Tokyo bench was, as has been stated, impossible in the circumstances of the time. In the end it may have been felt by those who were in a position to be aware of the trial - the politicians and diplomats and other officials of state - that the trial had unsatisfactorily answered the questions before it. The defence at the trial had raised pertinent questions that were potentially damaging to public morale. The dissension, on the bench, too, could not have been shielded from view by the decision of the bench to read only one judgement, that of the majority, in the open court. In particular, Justice Pal's dissentient judgement must have sown some seeds of doubt in the minds of the rulers of Western society. These men, the men who had a direct stake in the outcome of the trial because as the leaders of their respective countries they would be called upon to act upon the verdict of the Tribunal in its broader implications, were the custodians of the truth about the war for the populations that they ruled. It may well have been that the uncertain realities of the Pacific war, uncovered by the trial, were not considered suitable for a public which wanted certainty and not doubt. Certainly much information on the trial has

been on the restricted list in Australia until recently.[52]

It is vital to understand the susceptibilities of the post war populations in the Western world, in any approach to Sir William's role at the trial. To miss this point is to miss the fundamental tragedy of Webb's involvement at Tokyo. It was not so much a personal failure of Webb in any narrow careerist sense though that too was important.

Essentially Webb's failure was a failure to achieve a tragic view of the world's international relations in the sense used by Hall.[53] To have done so, would have amounted to a colossal exercise of individualism on the part of Webb. Arguably, the truth was subversive of Australian national aims and aspirations. The war had been fought against the Japanese to preserve the Australian way of life. That war was fought against an enemy that was, for nearly all Australians, unequivocally an aggressor. 'Aggression' was to most Australians cut and dried. It meant, before it meant anything else, an attack downwards by enormous number of

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[52] For example, 'Sir William Webb's Collection', upon which this thesis is largely based was not opened for access until last year. Some material in this collection still remains restricted. This in no way reflects upon the access policy of the Australian Archives. In fact, the Archives has made an exception to its '30 year rule' and is opening material on the second World War for access in order that the Pacific war be studied in greater detail. The Archives lists three main criteria upon which decisions are made as to whether material is to be opened for public access or not. These criteria are listed on a sheet entitled 'Access to Commonwealth Records'. The sheet lists three categories of information 'not normally released for public access'. The first category is the one which related most closely to my comments above. This reads

> '(i) exceptionally sensitive papers, the disclosure of which would be contrary to the public interest whether on security or other grounds (including the need to safeguard the revenue).'

[53] See above.

Asiatics. The Japanese had fulfilled a long standing neurotic prophecy. Webb could not have deviated from his interpretation with immunity. Far from it. The alternative view, that the Japanese ambition for empire was not substantially different from that of empire builders that had gone before her, would have been seen by Australians as an attack on their fundamental way of life. This, then, was the problem. It was a problem that Webb at least in part recognized.

The next chapter will establish that Webb was a fair and impartial judge, to a fault. Webb affirmed the ideal of judicial impartiality many times on the bench. In 1946, he wrote

> To give the accused a fair trial, the judges must have open minds on all questions that arise. The accused cannot be convicted of waging aggressive war unless the Tribunal is satisfied of their guilt beyond all reasonable doubt. 54

But how open was an open mind? To have been truly fair, Webb would have had to transcend any pre-conceptions he may have had of the pre-war status quo. But more importantly, an open mind in his approach to the trial was likely to place Webb in relative isolation from his own society, if Webb had the courage of his convictions. This was the broad base of political pressure with which Webb had to contend on the bench. Webb ran the rick in being fair and impartial on the bench, of invoking the hostility of his fellow Australians.

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54 Webb to all Judges, 27 November, 'Sir William Webb's Collection'. International Military Tribunal, 2481 (3rd Series), Australian War Memorial 417/1/7, 24 March, 1960. (Hereinafter referred to as 'Webb Collection') In bundle of papers labelled, 'President to all Judges. Miscellaneous May 1946- December 1947'.

It is against this background that Webb's participation in a political trial must be measured. The degree to which Webb behaved as an impartial judge must be weighed against the pressures on him to conform to a standard which assumed the Japanese guilty before the trial began.

The central argument to this thesis is that Webb's inability to conduct a fair trial in Tokyo stemmed basically from a perceptual failure. Webb failed to develop a clearly developed notion of aggressive war. This was not a failure of integrity. Webb's approach to the issue at the trial was an honest one. Webb set out to be just. But despite his efforts to be fair Webb did not know what justice was in the context of the trial. Webb was impeded in his efforts to be fair by external pressures, political pressures, operating at the trial. Webb's perceptual failure stemmed to a significant degree from this. But also significant was an inability to overcome an ethnocentric bias against the Japanese. The record reveals a man of integrity who assumed a particular notion of the pre-war world order without serious questioning, forced by the circumstances of the trial to re-think his assumptions of the past. Where Webb was able to view his pre-war assumption of the world order in which Australia was placed, skeptically, he was not able to substitute the doubts that emerged with a positive, clearly developed conception of a new world order - one in which war had been outlawed and in which a legal mechanism existed to maintain peace and harmony between nations. This, essentially, was Sir William Webb's contribution to 'victors' justice', to a political trial.

CHAPTER II

'LET JUSTICE BE DONE THOUGH THE HEAVENS FALL': THE LIFE AND CAREER OF SIR WILLIAM WEBB

Given the paramount significance of Sir William Webb in the course and outcome of the Tokyo Trial and the fact that he held high judicial office within the legal system in Australia, it is surprising that Webb remains, to this day, something of an enigma to public observers. This lack of information itself says something about his character and personality. Even within his own circle of family and friends Webb maintained a characteristic reserve. When Webb's daughter, now Mrs. Mary Mason, approached her father with a view to writing his biography, she was rebuffed by him with a statement to the effect

> The significant work in my life is embodied in my judgements, which are published. 1

This was simply the pragmatic statement of a practical man. The human aspects of Webb's achievements were not considered by him to be important. In the words of Mrs. Mason

> ...the idea that anyone would have been remotely interested in him as a person would never have entered his head. 2

Partly, then, as a result of Webb's characteristic reticence about himself as a person, biographical information on him is not easily found. And so only the broad outline of Webb's life and career can be ascertained by the student of Webb's role in the Tokyo Trial.[3]

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[1] Mr. Routh, Reference Librarian, University of Queensland Library in correspondence with me, May 8, 1975.

[2] Mrs. Mary Mason in private correspondence with me, August 19, 1975.

[3] The brief sketch of Webb's life and career which follows is drawn primarily from T.D. McCawley, 'Sir William Webb; an Appreciation', The Leader, September 3, 1972.

Webb was born January 21, 1887, in Brisbane, Australia, of lower middle class parentage. Webb's early education took place in Roman Catholic schools. In 1904 Webb successfully sat for a public service examination and entered the Home Secretary's Department. Early in his career, Webb was advised by T.W. McCawley that the path to success within the public service lay in obtaining a qualification in law. And so in 1909 Webb applied to be admitted as a student-at-law at Queensland University. Four years later, in 1913 Webb passed his final bar examination and was admitted to the Bar in the same year. Thereafter, Webb's rise in the Public Service was rapid indeed. At the age of thirty, he was Crown Solicitor.

Early in his career, Webb achieved high rank within the Queensland judiciary. In 1925 the Presidency of the Arbitration Court of Queensland was conferred upon Webb and he held this post until 1946. Further judicial appointments were conferred upon Webb and these culminated, in 1940, in his appointment as Chief Justice of Queensland. In 1946 he was appointed President of the International Military Tribunal for the Far East. While still serving in this capacity he was further appointed in 1947 as a judge of the High Court of Australia. Webb remained a High Court judge until his retirement in 1958. Webb died in August 1972 at the age of eighty five.

Webb's career had been a full one indeed. Apart from his role as a public servant and as a judge, Webb had held a number of extra-judicial and semi-judicial posts. In 1926 he had been appointed to the Sugar Cane Prices Board and he conducted a number of enquiries for the Government on important issues of the day.

But despite the fact that Webb held positions of prominence in the Australian community of that time, he did not achieve true eminence in these positions. His performance was, generally speaking, competent, but colourless. Geoffrey Sawer says, of the appointment of Webb to the High Court, that the Labour Government of the day

> took the safe timorous course of appointing Sir William Webb...an able and respected lawyer, but neither outstandingly brilliant nor in the least likely to originate new constitutional ideas. [4]

Although Webb's judicial and administrative experience had been wide it had not been such as to especially equip him for the task in Tokyo. Webb had not, by experience, or training become in any sense an expert in international criminal law by the time of the Tokyo Trial. He had, during the war years, conducted an investigation into Japanese atrocities[5] perpetrated during the conflict between Japan and the Allies, but this experience did, if anything, have a negative effect upon his ability to successfully conduct a fair trial in Tokyo.

Throughout his life Webb did not develop and articulate an individualist philosophy of life. Webb was not a deep thinker. Rather his behaviour and attitudes were influenced by a simple religious faith. Webb remained, throughout his life, a staunch Roman Catholic.

Inevitably, of course, Webb was a product of the broader Australian Protestant culture of the time and he shared the

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[4] Geoffrey Sawer, Australian Federalism in the Courts, (Melbourne, 1967).

[5] i.e. The Webb Report, See above for a fuller discussion of this.

fundamental values of his contemporaries. Webb's career successes, and the upward social mobility that accompanied this stemmed from a living out of the Protestant 'self help' ethic. Webb worked as a farm labourer to help pay for his early education and was proud of the fact.[6]

It is worth noting that Webb's Catholic faith must have been a factor serving to mitigate the intensity of Webb's ethnocentric imperial bias in his thinking on aggressive war in Tokyo. As a youth Webb would have been educated into the suffering of the Irish people at the hands of their British oppressors and the carry over from this must have been a conception of the British Empire as something less glorious than that conceived by his Protestant and State school contemporaries.[7]

Webb's characteristic humanitarianism as a judge, both in the domestic sphere and in Tokyo stemmed in large measure from his deeply felt religious principles. Whereas at the trial Webb was inclined towards the view the Japanese conquests in the Pacific War were intrinsically wrong as a result of his own imperial bias, Webb's humanitarianism operated as a check on any inclination in Webb to a desire for vengeance on the Japanese on that score.

Webb was not openly committed to any particular political philosophy or organization, but a political inclination can be observed in his behaviour, indirectly. Generally, Webb

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[6] McCawley, 'Sir William Webb; an Appreciation', p.7.

[7] See Clark, A Short History of Australia at page 149 for an account of the social values of Roman Catholic schools in the later decades of the nineteenth century. These values remained substantially the same during the period in which Webb received his early education, in the early twentieth century.

inclined towards a pro-Labour point of view. Webb had close associations with the Labour Party - he was a personal friend of T.J. Ryan, the first Labour Premier of Queensland, and of Dr. Evatt - and many of his appointments to official office were made by the Labour Party. His two most important judicial offices, to the High Court of Australia, and to the International Military Tribunal, were Labour appointments. This is not to say that these appointments were political in any hard sense, just that Webb's judicial modus operandi was generally consistent with the pro-Labour philosophy of the day.

Webb was, then, certainly no reactionary in terms of the domestic political philosophies and practice of his day. To that extent, at least the chief presider on the Tokyo bench was an open-minded thinker. But although not a conservative thinker with entrenched ideas, neither was Webb in any sense a visionary, and his political sympathies ceased well short of the far left of the Australian Labour movement.[8] Webb's dislike of international Communism was to be a factor affecting Webb's relations with the Russian authorities at the trial. It meant that Webb had to exercise considerable self-restraint, a self-restraint demanded by the potential damage to justice in Tokyo from cold-war tensions on the bench. Webb's personal dislike of Communism, however, was not a major factor affecting justice in Tokyo because Webb was able to bridle his anti-Russian bias.[9]

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[8] See above for a brief reference to Webb's criticism of Communist activities within the Queensland meat industry. McCawley suggests that Webb exercised a 'restraining influence' upon the Russians taking part in the Tokyo Trial. In saying this, McCawley implies that Webb disapproved of the Russian presence at the trial.
McCawley, 'Sir William Webb; an Appreciation', p.8.

[9] See above.

Labour appointee though Webb was, he was not prepared to compromise his judicial ethics in the face of indirect political pressure from Canberra to find the Japanese guilty in Tokyo. In 1945, Dr. Evatt made a public statement on his public release of the Webb Report. Evatt left no doubt as to the Australian Government's view on the ultimate responsibility for the war crimes detailed in the Webb Report. Evatt said,

> ...I emphasize most of all that the war crimes committed by Japanese forces in the field, while utterly wicked on the part of the actual perpetrators, are also part of a system of terrorism in which all Japanese troops and commanders participated. It is our duty to see that those who organized the system are punished and the system itself is completely eradicated. Those at the top are, in our view, at least equally guilty with the actual perpetrators on the spot.... 10

Evatt continued in the same statement to foreshadow the approach of the Tokyo Trial.

> Furthermore, it is the view of the Australian Government that the general charge of planning and waging aggressive warfare which will shortly be preferred against major German war criminals applies equally to those in Japan who are ultimately responsible for the acts detailed in Sir William Webb's report. 11

Without a doubt, then, the Australian Government had openly and unequivocally pre-judged the twenty five Japanese defendants who were to be charged in Tokyo. Clearly the Australian Government was not inclined towards the conduct of a fair trial in Tokyo. This is also indicated by their conduct of conventional war crimes trials of Japanese officials. One commentator of these trials, at least, took

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10 'The Webb Report', Salt (Australian Army and Airforce Educational Journal) II, October 8, 1945, p.17.

11 Op.cit.

the view that their trials had taken on the character of a 'revenge party'.[12] Certainly the motives of the Australian Government in their relationship with Webb in his role as President of the Trial were suspect, to say the least. Well into the proceedings, the Chifley Labour administration sought Webb's permanent return to Australia to sit on the High Court. Webb's extended absence from High Court duties in Australia was proving an embarrassment to the Government and they were anxious to have Webb returned to Australia. The official reason for the proposed recall of Webb was that his return was necessary to lighten the burden on Webb's fellow judges on the High Court.[13] In 1947 the urgency to have the full complement of judges on the High Court bench was heightened by the challenge in the High Court to the Federal State Banking lesiglation.[14] It seems likely that, apart from the need to have an uncluttered High Court ready for a prompt hearing of the State Banking case,[15] that the Chifley Government was anxious to have Sir William, a Labour appointee to the High Court, amongst the judges hearing the case in the hope that it would improve the Government's chances of a

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[12] George Dickinson, 'Japanese War Trials', Australian Quarterly, June 1952, p.75.

[13] 'Sir William Webb for High Court Soon', Herald (Melbourne) November 6, 1947. Prime Minister Chifley was reported stating the reason for Webb's recall.

[14] At around this time the Chifley Government had put a Bill through Federal Parliament providing for the nationalization of some banks. It was a controversial law and was challenged by the banks that were the subject of the new law. The case which ensued was an important consitutional one involving the consideration of the powers of the Federal Government.

[15] Newspaper speculation of the time stressed the onset of the Banking Case in their explanation of Webb's recall. Op.cit.

favourable decision from its point of view.[16]

Certainly the Australian Government's decision to recall Webb from the Tokyo Tribunal was a remarkable one in the circumstances. The eyes of the world, at least within top official circles were on the trial. Apart from the intrinsic importance of the issues to be decided by the court, Australia's reputation as a just and peace loving nation was at stake. As General MacArthur put it in opposing Webb's recall to the Australian Government

> It (the recall) would unquestionably be misunderstood by world public opinion which... would misinterpret Australia's motives and condemn her therefor. 17

Sir John Latham, Chief Justice of the High Court of Australia, argued against Webb's recall on the grounds that the Australian Government had neither the right nor the power to direct Webb to sit on the banking case, that any move to do so would be especially improper since the Government was a litigant in the case.[18] Eventually, Chifley and Evatt were swayed by the arguments of MacArthur and Latham and they abandoned their plan to recall Webb. Not only were the Australian Government's motives in trying to recall Webb from Tokyo suspect in relation to the banking case, they further revealed a scant regard for justice in Tokyo, too. As MacArthur had further stated,

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[16] Certainly, the Prime Minister privately requested Webb's return to Australia from Tokyo specifically for the Banking Case. Sir William Webb to Sir John Latham, Department of External Affairs, cablegram, January 27, 1948. 'Sir John Latham Papers' MS 1009. National Library, Canberra.

[17] General MacArthur to Prime Minister Chifley, October 7, 1947. 'Webb Collection' (A.W.M.) In bundle of papers labelled 'Sir William - Personal - Australia I'.

[18] Latham to Webb, February 2, 1948. 'Sir John Latham Papers', MS 1009. National Library of Australia, Canberra, P.1009/62/320.

Webb's recall could have demoralized the whole proceedings there.[19] Webb's recall was no threat to the crude aim of 'victors' justice' reflected in Dr. Evatt's public statement on the release of the Webb Report. Probably they felt that a guilty verdict against the Japanese was a foregone conclusion whether Webb was present at the trial or not.

Clearly, then, Australian officialdom was pre-disposed towards the conduct of a political trial. But what was Webb's pre-disposition in this regard? What was the judicial modus operandi of the man who was to so greatly influence the course of the proceedings in Tokyo? Before proceeding to examine Webb's role in the proceedings in some detail, it is worth briefly examining Webb's judicial style as it was revealed in his conduct of official inquiries in order to gauge his readiness for the elevated task that awaited him in Tokyo in the early post war years.

Webb's official writings reveal a man who was thorough and systematic in his approach to the issues before him, but who was at the same time unadventurous, unoriginal and uninspiring. Furthermore, they reveal a man who was more at home when he was dealing with the concrete and the practical, but who was inadequate when he came to deal with the abstract and the philosophical. On the one hand this meant that Webb's approach tended to be just because he made impartial and reasoned judgements, but the reverse side of the coin of Webb's judicial impartiality was that he was unable to effectively place the law in its broader social context, also the mark of a good judge.

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[19] MacArthur to Chifley, October 7, 1947 (in place cited above).

Webb conducted a number of major enquiries throughout his career; The Royal Commission on Transport (1936-1937), The Royal Commission on the Sugar Industry (1939), the censorship enquiry in 1944, an investigation into Japanese atrocities, and two separate investigations into the salaries of Queensland members of Parliament, one in 1960 and the other in 1963.

The Committee preparing the salaries report[20] in 1963, under the chairmanship of Webb, adopted a systematic and thorough approach to the issues before it. The Committee's approach was restrictive, keeping narrowly to the issues before it. As such the salaries report clearly bore the stamp of Webb's judicial approach generally. The Committee set out to provide a practical answer to a practical problem and was not concerned to elucidate broad principles of policy even though it was open for it to do so.

The Committee was called upon to decide whether the salaries of state members of Parliament in Queensland were adequate at the time. The Report gave promise of a wider investigation against a broad social perspective. Evidence was taken from experts from the Political Science Faculty of the University of Queensland.[21] But that evidence was not

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[20] Sir William Webb (Chairman), Report of Committee of Inquiry Appointed to Enquire into and Report upon the Salaries of Members of Parliament, Officials in Parliament, and Ministers of the Crown of the State of Queensland. (Brisbane Government Printer, Brisbane, 1961).

[21] Webb (Chairman), Salaries Report, 1963, p.2.

tabled and, if it did influence the report, it was not clear from the concluding observations of the report how it did. The only concession to a broader historical perspective was a bald statement that the purpose of paying members was to secure working class representation in Parliament and that this remained a guiding principle at the time of the report. The principle was extended in the report to make the point that, 'the salary should be such as to attract men with the capacity to become effective members of Parliament'.[22] The complexities of what constituted an adequate salary were not detailed in the light of any precedents from the past. The Committee's acknowledgement of academic expert advice from the Queensland University Department of History and Politics was luke warm. The advice was 'found helpful'.[23]

A concluding paragraph to the report typified the approach of Webb to his official tasks in its stress upon the separation of powers.

> The Committee must be just not generous in its recommendations. It recommends only what its enquiries disclose to be the proper remuneration in all the circumstances, not what the heart dictates! Any generosity falls within Parliament's exclusive domain upon which the Committee must not trespass. [24]

Though generally speaking Webb was a fair and impartial practitioner of his profession, this was not true without exception. During the war, Webb had, in an emotional dictum, from the bench of the Queensland Industrial Court, slated what

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[22] Webb (Chairman), Salaries Report 1963, p.3.
[23] Webb (Chairman), Salaries Report 1963, p.6.
[24] Webb (Chairman), Salaries Report 1963, p.12.

he saw as a subversive Communist influence in the Queensland meat industry.[25] Narrowness of approach in Webb did not always imply strict impartiality. A prime example of this can be found in Webb's report on Japanese atrocities,[26] prepared by him for the Australian Government during the war.

In preparing this report, Webb clearly set out to ascertain, as accurately as he could, the material facts on Japanese atrocities and to draw strictly relevant conclusions from those facts. But Webb fell short of this goal. Section IV of the report presented a summary of the 'facts and findings' of the report.[27] The whole section presented the Japanese as fiendish monsters. To a degree this is understandable given the horrific nature of the findings. But in the course of his findings Webb made an absurdly superficial observation to which he attached a good deal of importance. On page 426 of the report he said,

> I have suggested that atrocities rise and fall with the success and defeat of the Japanese armies.

Webb was not merely commenting upon a coincidence between Japanese military successes and an increase in the number of atrocities. He speculated beyond this.

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25 'To Try Jap War Criminals', The Herald (Melbourne), January 16, 1946.

26 'A Report on Japanese Atrocities and Breaches of the Rules of Warfare by Sir William Webb K.T. 1941-1944', Australian War Memorial, Miscellaneous Records, 1939-1945, A.W.M. Series Volume 421. Copy held in Australian Archives, Canberra.
From here on I will refer to this report by its short title, 'Webb Report'.

27 'Webb Report', p.384-410.

> Japanese atrocities were at the flood until their armies met defeat since when they appear to have receded. But if this suggests the true explanation of their conduct, it would be unwise to proclaim it whilst the war continues, as it might provoke them to commit further atrocities. 28

Webb here elevated the fact of a coincidence of increase in atrocities, and military success to the status of an explanation. Clearly the impression that came across in the 'Webb Report' was that of the cowardice of the Japanese troops committing the atrocities. The notion was that of a treacherous foe that will inflict serious injuries on their victims when they are 'down'. Webb was prepared to let this hypothesis stand in the report, unsubstantiated and unreasoned.

Further in the report Webb said,

> ...the evidence collected by me suggests that victorious Japanese soldiers behave fiendishly, although my jurisdiction, extensive as it is, is too limited to justify any conclusions about the Japanese generally. 29

Clearly this is a racist hypothesis.

It would be misleading and superficial to view Webb's feelings towards the Japanese in isolation from the broader social context in which they formed. Webb's surface reaction in his report was one of physical revulsion to the acts committed by the Japanese military on their victims. In Webb's mind, the Japanese soldiers were 'fiends' and 'monsters'. But this would not in itself be enough to explain why a man of strong principle failed to produce an objective report. The fact that Webb generalized about the Japanese nation as a whole from the particular instances of depravity revealed

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28 'Webb Report', p.386.

29 'Webb Report', p.385.

by his investigation, demonstrates a more deep seated awareness of the Japanese racial and national character. Re-enforcing Webb's feelings of physical revulsion was a fundamental ethnocentric bias against the Japanese shared generally by Australians at the time.

Webb concluded his discussion of Japanese cannibalism in the report with the statement,

> However, it is worthy of note that the majority of Japanese soldiers who were left without food preferred to starve to death rather than resort to cannibalism. 30

Immediately following this statement Webb noted in parenthesis,

> There is, of course, the comparatively recent case of Europeans resorting to cannibalism in an extremity. 31

Now since Webb offers this last piece of information to qualify the impression of the Japanese soldiers as cannibals it can be clearly seen for what it is; a racist comparison between the culture of Europeans and that of the Japanese.

In this way, then, the implicit effect of the 'Webb Report' was to elevate the conception of 'the in-group' (white, European-derived, native Australians) of itself, 'as superior in morality, ability and general development'. Implied in the report was a conception of 'the out group' - the Japanese - as beings of lesser morality and 'lower development'.[32]

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30 'Webb Report', p.408.

31 'Webb Report', p.408.

32 The phrasing quoted in this paragraph of my essay is that used by Douglas Cole in his definition of Australian ethnocentrism. See above in Chapter I of this thesis where I quote Cole's definition.

It is clear from the 'Webb Report' that Webb was an unsuitable choice for the Tokyo Trial. But it was the impropriety of Webb's appointment, notwithstanding his prior role as Australian War Crimes Commissioner, rather than the existence of bias per se that was the focus of criticism within the Australian judiciary. Justice Brennan, of the Queensland Supreme Court, stated publicly,

> ...What will foreign nations think of such a state of affairs...could British justice allow a detective who had investigated crimes and made findings against a class preside as a judicial officer to try other offenders of the same class? The issue will surely be raised and Australia and Sir William Webb may be placed in a false and invidious position and Australia made to look stupid.

Brennan's statement was further evidence of the fact that Australian officialdom was more concerned with the appearance, rather than the reality of justice in Tokyo.

It might be thought that Webb's view of justice in relation to the Japanese role in the Pacific war may have crystallized in the years following the trial. But this was not the case. In 1971 Webb wrote an introduction to David Bergamini's book Japan's Imperial Conspiracy[33] in which he discussed the trial and his own place in those proceedings in relation to the general content of Bergamini's book. Beneath the surface assurance of this introduction remained doubts which extended to the most fundamental issue of the trial. Webb said,

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[33] Cited above in Chapter I.

> I sometimes asked myself what right we had to condemn Japan for having resorted to belligerency in 1941. I perceived much justice and extenuation in the able arguments of defense counsel that Japan was a tiny land of 90,000,000 and 15 percent cultivable soil, and that she had been subjected to severe trade restrictions and limitations from without. I pondered how the United States would have reacted in that situation, and, indeed how their peoples would have wanted them to react. 34

This is a far cry from the narrow and insular conception of the Japanese nation that was reflected, indirectly, in the 'Webb Report'. Webb in the same passage answered his own question thus; 'The United States and Britain, in a situation like Japan's in 1941 might well have had recourse to war'.[35] Indeed Webb had not forgotten that Britain had been, herself, an imperialist nation in the nineteenth century.[36] By his own account, then, Webb was, at the time of the trial, attempting to overcome his ethnocentric imperial bias in examining the intrinsic morality of the Pacific war. That attempt, it is clear from the tone of Webb's statements in the Introduction was attended by considerable lack of confidence on his part. When Webb focused his attention on the concrete realities of the law of aggression, he did so with an air of resignation.

> Briefly and simply then, this was the legal position at the opening of the Tribunal; if Japan was guilty of aggressive war, according to the Pact of Paris and the Instrument of Surrender of Japan which she had signed, her political, military and other war leaders were individually liable. The only defense which she could make was 'self defense'. 37

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34 Webb in Bergamini, Japan's Imperial Conspiracy, pp.xi,xii.

35 Webb in Bergamini, Japan's Imperial Conspiracy, p.xi.

36 Webb in Bergamini, Japan's Imperial Conspiracy, p.xi.

37 Webb in Bergamini, Japan's Imperial Conspiracy, pp.xii,xiii.

Webb's statement appears very much as an imposition of an arbitrary standard with which Japanese behaviour in building her co-prosperity sphere was to be measured. The tone and feeling of this statement following, as it does, Webb's expressed moral doubts on aggressive war, is that of a man who is much less than convinced that that legal standard given definition in the Pact of Paris and the Instrument of Surrender, fitted the reality of international relations.

In Webb's introduction, then, we can read the tragedy of a man who may have gone a considerable way towards formulating a tragic view of the Pacific war, a view which did not take refuge in ethnocentric assumptions of the superiority of the white Anglo Saxon Australian and the intrinsic evil of the Japanese, but which could not achieve a positive base, or positive theoretical foundation upon which differing national and ethnic aspirations could be reconciled. In other words, in Webb's introduction we can read a major theme in Webb's life, a theme which, for the remaining twenty years or so of his life after the trial must have dominated his conscience.

In sum, Webb's life and career suggest that he was the last person to conduct a political trial. Webb had a 'high sense of the dignity, integrity, and independence of his profession'.[38] Webb's relatives and friends felt that his whole life epitomized the values expressed in the motto that Webb chose for his knighthood crest: 'Let justice be done though the heavens fall'.[39] That this was true in the

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[38] Bergamini, Japan's Imperial Conspiracy, p.177.

[39] Mrs. Mary Mason in correspondence with me, February 11, 1976.

domestic phase of Webb's career is largely borne out by the results of Webb's judicial practice. But the 'Webb Report' and the Tokyo Trial represented a notable exception in Webb's career in that he failed to implement his ideals of justice. The process whereby a man, so bestowed with high judicial ethics and ideals was the main influence in the conduct of a political trial is the subject of the remaining chapters of this thesis.

CHAPTER III

THE DYNAMICS OF WEBB'S ROLE IN 'VICTORS' JUSTICE'

Before proceeding to examine Sir William's role in the trial, it is necessary to examine the formal context of the trial within which he operated.

The Pacific war officially ended on September 2, 1945, when Japanese envoys signed the Allied Instrument of Surrender aboard the USS Missouri in Tokyo Bay. The Instrument of Surrender effected a dramatic change in the relations between Japan and the Allies. They then stood, in no uncertain terms in relation to one another, as victor and vanquished. The victors followed the lead of Nuremburg and decided to put the leaders of the Japanese Nation on trial for having waged the war.

The very essence of the move to make aggressive war a crime lay in a desire to regulate relations between nations by authority other than physical force. And so the framers of, and the participants in, the trial had searched for constitutional authority upon which to base the trial. This task was not easy since international law provided no clear authority for such a move.

As the Tribunal progressed, it based its authority to hear the charges on: the Instrument of Surrender which, in defining the general terms of surrender, specifically provided that 'stern justice shall be meted out to all war criminals';[1] the Proclamation by the Supreme Commander for

[1] 'Proclamation by the Supreme Commander for the Allied Powers, January 19, 1946.' in Minear, Victors' Justice, p.183.

the Allied Powers, January 19, 1946, in which General MacArthur by the authority vested in him by the Potsdam Declaration (July 26, 1945) and the Instrument of Surrender, ordered that the International Military Tribunal be established to try Japanese war criminals, and the Charter of the International Military Tribunal for the Far East, April 26, 1946, which spelled out the 'Constitution, jurisdiction and functions' of the Tribunal. The Tokyo Tribunal relied upon Nuremburg as a legal precedent to confirm the authority outlined above. The Nuremburg Tribunal had held that the Charter was 'the expression of international law existing at the time of its creation'.[2] Webb upheld this definition of the authority of the Tribunal, though not without some reservation, as we shall see in Chapter IV.

The Tribunal also had to define a legal basis for the proposition that aggressive war was a crime in international law. The Tribunal rejected the defense challenge that aggressive war was not a crime. The court held that the Pact of Paris made resort to war, 'as an instrument of national policy...illegal in international law'.[3] Again Webb upheld this interpretation on the grounds that the Pact of Paris had outlawed aggressive war, that the Charter had given expression to this, and that the Charter was valid on the authority of Nuremburg.

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[2] The phrase used in Article 2 of the Proclamation. Minear, Victors' Justice, p.184.

[3] In so upholding the authority of the Pact in outlawing aggressive war the Tokyo Tribunal quoted, verbatim, the Nuremburg judgement.
Minear, Victors' Justice, p.27.

> The Nuremburg Tribunal held that the Charter was the expression of International Law, that is to say, that it did not go further than the Pact of Paris and the Laws and Customs of War. The Pact recognizes as a crime recourse to aggressive war.[4]

But International Law was equivocal on this issue and the authorities on International Law[5] were divided. The alternative view argued that although the Pact of Paris had decried the use of war as an instrument of national policy, it had not gone as far as actually making it illegal. Webb himself remained throughout the trial, far from convinced that aggressive war was illegal.[6]

Related to the question of the status of aggressive war in international criminal law was issue of individual responsibility for illegal aggression. The position was far from clear in international law, but the Tribunal, relying on Nuremburg, held that individuals could be held responsible for aggressive acts of State.[7] The majority ruled, on the authority of Nuremburg, that the Charter, which had stated that the charges against the

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[4] Webb, Separate Concurring Opinion, p.264. N.B. Beginning from this point in the thesis frequent reference will be made to two separate but related judgement documents prepared by Webb. These are:

1. 'U.S.A. and Others v. Araki and Others. Judgement of the President and Australian Member', and
2. U.S.A. and Others v. Araki and Others. Judgement of the President.

The first named is a longer document in two volumes and was a draft only. The second was much shorter and filed as part of the proceedings as a separate concurring opinion. This is fully explained later in this thesis. To avoid confusion, I will cite the two judgements by their short titles as follows: The first named document I will refer to as 'Final Draft Judgement' and the second as Separate Concurring Opinion. Note that the 'Final Draft Judgement' is numbered consecutively across both volumes.

[5] See Minear, Victors' Justice, beginning at p.47 for a discussion of this.

[6] See above.

[7] Minear, Victors' Justice, p.46.

defendants were

> crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility [8]

was valid.[9] Webb also upheld the notion of individual responsibility for aggressive war[10] and adopted a stricter stance on this than had most of his colleagues on the bench.[11]

Conspiracy in international criminal law represented another confused area. The Prosecution at the trial argued that conspiracy not followed by the actual waging of aggressive war was a crime. The Defence opposed this view, arguing that the notion of conspiracy as a separate (from actual waging) crime was a peculiarly Anglo-American concept which did not apply in international law. The majority accepted the Prosecution's argument. Two of the judges, Pal and Webb, upheld the reasoning of the defence. Webb, in his separate opinion, said,

> The Pact (of Paris) recognizes as a crime recourse to aggressive war. This does not include conspiracy not followed by war. So too the Laws and Customs of War do not make mere naked conspiracy a crime. 12

Eleven different nationalities were represented on the bench; Hon. Sir William Flood Webb (Australia), Hon. E. Stuart McDougal (Canada), Hon. Ju-Ao Mei (China), Hon. Henri Bernard (France), Bernard Victor A. Roling (Netherlands),

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[8] 'Charter of the International Military Tribunal for the Far East, April 26, 1946', Section II, Article 5. Reproduced in Minear, Victors' Justice, p.186.

[9] Minear, Victors' Justice, p.27.

[10] Webb, 'Final Draft Judgement', p.20.

[11] See discussion of Webb's attitude to the responsibility of the Emperor later in this chapter and again in Chapter IV.

[12] Webb, Separate Concurring Opinion, p.264.

Hon. Erima Harvey Northcroft (New Zealand), Hon. I.M. Zaryanov (USSR), Hon. Lord Patrick (United Kingdom of Great Britain and Northern Ireland), Major General Myron C. Cramer (USA), Hon. R.B. Pal (India), and Hon. Delfin Jaranilla (Philippines).[13]

All the judges came from the victor nations; Japan, and neutral countries were not represented on the bench. All the justices named above remained for the full duration of the trial though a number of judges were absent for periods of time throughout the proceedings. From the commencement of the trial only one vacancy had occurred on the bench. Justice John Higgins had resigned one month into the proceedings and had been replaced by Cramer.

On May 3, 1946, the bench set out to hear the charges against the twenty eight Japanese defendants. The trial lasted a long time; from May 1946 to November 1948. The Tokyo Trial took about two and a half years to complete, whereas Nuremburg had taken approximately ten months.

Before discussing Webb's role in the proceedings, I will examine the formal nature of that role. There are two aspects here, the procedural guidelines generally laid down for the conduct of the trial and how they affected Webb's day to day handling of the court, and more specifically, the extent to which the relationship between Webb and the other judges was given formal definition.

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[13] As listed in the 'Webb Collection' (my parenthesis) (AWM). Bundle of papers labelled 'Biographical' and under the heading 'Members I.M.T.F.F.E.'.

The procedure to be adopted by the court was outlined in the Charter of the International Military Tribunal for the Far East, April 26, 1946. The procedural guidelines defining the general conduct of the trial and the relationship between the judges were very broad indeed and left a wide area for judicial discretion. Article 7 provided that

> the Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter. 14

The Charter was no less general in its sections dealing with evidence. Article 13a read

> The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value...

The Tribunal could request to be informed of the nature of any evidence before it was offered for a ruling on its admissibility (Article 13b). The Charter made no attempt to define 'probative value'. The nearest it came was to list five categories of 'specific evidence admissible' in Article 13c. Article 13c was to operate 'without limiting in any way, the scope of the foregoing rules'. No guidelines existed as to whether evidence falling within these five categories had probative value other than the directives in Article 12, a, b, and c, which implied that the judges were to take a strict view of relevance. Article 9e (Production of Evidence for Defense) directed the defence specifically to show relevancy

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14 The Tribunal did draft 9 rules of procedure on the authority of Article 7 of the Charter, but these did not, to any great extent, more closely define the procedure to be adopted by the Tribunal. These rules are set out in Appendix IV in J. Keenan and B. Brown, Crimes Against International Law (Washington, 1950), p.184.

when producing evidence. No corresponding section 'Production of Evidence for Prosecution' existed and the procedure to be followed by the Prosecution in making application to present evidence was covered by Article 13b and Article 15d which stated

> The prosecution and defense may offer evidence, and the admissibility of the same shall be determined by the Tribunal.

Nowhere in the Charter was the role of the President defined in any detail. He had a casting vote (Article 4b) and although the Charter did not address itself to the speaking role of the judges, Webb was elected by his colleagues as spokesman for the bench. As spokesman Webb would have had scope for the exercise of his own discretion but this must not be overstated.[15]

Some sections of the Charter more than others fell squarely on Webb's shoulders as the spokesman and chairman of the Court who was responsible for the day to day proceedings. For example, Article 12, under the heading 'Conduct of Trial', listed the following:

> The Tribunal shall:
>
> a. Confine the trial strictly to an expeditious hearing of the issues raised by the charges.
>
> b. Take strict measures to prevent any action which would cause any unreasonable delay and rule out any irrelevant issues and statements of any kind whatsoever.
>
> c. Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

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[15] See discussion later in this Chapter.

These provisions in Article 12 provided those in Article 7 with a sharper focus. The discretion given to the judges to decide upon rules of procedure as they went was subject to the fundamental need to streamline the proceedings, to avoid inefficiency and delay.

In particular, the time factor was stressed elsewhere in the Charter. The emphasis was on justice, efficiency and speed. Article 1 read, in part:

> Tribunal established...for the just and prompt trial and punishment of the major war criminals in the Far East.

None of the provisions of the Charter clearly defined the President's role in his relationship with the other judges on the bench, although the following broad provisions did exist: Article 2 set out the number of justices to be appointed; Article 3 provided for the appointment of a President of the Tribunal; and Article 4a provided that six judges were necessary to convene the Tribunal in formal session and that a majority of all members was necessary to constitute a quorum. Article 4b provided that the President had a casting vote in the event of a tied decision and Article 4c left each judge with a discretion as to whether he should disqualify himself from the Tribunal on the ground of absence from the proceedings.[16]

On November 4, 1948, President Webb commenced reading the judgement of the Tribunal. This was a massive document, 1218 pages long. It included the findings of the Tribunal on the constitution and jurisdiction of the Tribunal (15 pages), the Tribunal's findings of fact in relation to the charges in the

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[16] The defence took exception to Webb's absence from the proceedings for several months. Webb did not disqualify himself under Article 4c, see Minear, Victors' Justice, p.88.

indictment (1,0535 pages), the judgement of the Tribunal (7 pages), and the verdicts handed down on the individual defendants (82 pages). The vast bulk of this document lay in its findings of fact. In this section the Tribunal found that the facts alleged by the Prosecution had been proved. In its judgement the Tribunal upheld the interpretation placed upon those facts by the Prosecution, that the Japanese had been guilty of waging aggressive war, as charged. They also found the Japanese guilty of a general conspiracy charge (Count 1 of the indictment). In their verdicts section, the Tribunal decided the culpability of the individual defendants with respect to their findings on the charges and set penalties accordingly. The verdicts and sentences were harsh. No defendant of the twenty five who eventually received judgement was acquitted on all counts. Seven were condemned to death.[17]

The judgement was signed by nine justices; Webb, Northcroft, Cramer, Zaryanov, Jaranilla, Patrick, McDougal, Mei and Bernard. The two outright dissenters were Pal and Rolings. But there had not been unanimous agreement amongst the signatories of the Tribunal's judgement. Three of these issued separate concurring opinions; Webb, Bernard and Jaranilla.

It is not possible to understand Webb's role as President of the Tribunal without examining the political aspects of that role. This is best summed up in the phrase 'bench politics'. There was an internal and an external aspect to

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[17] The other penalties meted out by the Tribunal were severe. Sixteen defendants received life imprisonment, one got twenty years imprisonment and one, Shigemitsu, received seven years imprisonment.

bench politics. The external aspect involved political pressures originating from outside the actual proceedings. It is this aspect that I will deal with first here. The internal aspect of bench politics arose from the personal relationships between the judges and I will deal with this later in this chapter.

In the early occupation of Japan by the Allied forces, the tension between East and West had been so severe as to be not far short of open conflict.[18] Specifically cold war tensions were evident in the workings of the Tribunal.[19] No judge of the Tribunal, despite the official, theoretical position that they were above politics, that they were to 'administer justice according to law and without fear, favour, or affection',[20] was able to operate with complete freedom from the cold war tensions of the time.

The Russians had entered the war against Japan late and there was a strong feeling abroad in the non-Communist international community that their motives in entering the war were suspect.[21] Also, the Russians had a fundamentally different conception of justice from the other Allied nations represented at the trial. As Hankey points out, the Russians

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[18] See Douglas MacArthur Reminiscences (London, 1965), Part Eight Chapter I, 2nd paragraph, p.285.

[19] Lord Hankey implies that Shigemitsu was indicted as a result of pressure from the Russians. Lord Hankey Politics, Trials and Errors, (Oxford, 1950), p.142.

[20] The affirmation signed by nine justices of the Bench of Tokyo. Minear, Victors' Justice, p.5.

[21] Hankey reflects a general attitude of hostility towards the Russians and their role in the two major war crimes trials, that was widespread in the West shortly after the war. Lord Hankey, Politics, Trials and Errors, p.136-143. So does T.D. McCawley in his article, 'Sir William Webb: An Appreciation', p.8, column 1.

perceived Western courts as instruments of the ruling classes.[22] Hence, the general Russian charge that the whole occupation, including the trial, was designed to further the imperialist interests of the capitalists in the West.[23] In view of this, it is difficult to see how the Tribunal could have failed to have upheld Russian allegations that the Japanese waged aggressive war against them without severe political repercussions.[24]

It is certain that Webb was subject to the pressure of the cold war situation in the final judgement deliberations and the pressure of achieving compromise between Russian and Western viewpoints must have been considerable. But Webb seems to have handled this East-West tension successfully. If Webb was exercising a 'restraining influence upon his more extreme colleagues'[25] (the Russians) he did so with a sense of diplomacy for the Russians generally approved of Webb's handling of the court.[26]

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[22] Hankey, Politics, Trials and Errors, p.9.

[23] M. Raginskii and S. Rosenblitt, 'What do the Peoples of the World expect from the International Military Tribunal in Tokyo?', Novosti Daya, published in Shanghai, July 2, 1948. An English translation is to be found in the 'Webb Collection', in bundle of papers labelled 'Miscellaneous Correspondence 1946/48'. See especially p.1-2 of this translation.

[24] The Russians had publicly pressed their claim for 'severe punishment of major Japanese war criminals', and referring again to the Japanese defendants for the 'Tribunal to render in full what was due to them for their aggression against the U.S.S.R.'. See Raginskii and Rosenblitt, 'What do the Peoples of the World expect from the International Military Tribunal in Tokyo?', p.6 of the English translation in the 'Webb Collection'.

[25] McCawley, 'Sir William Webb: An Appreciation', p.8.

[26] M. Raginskii and S. Rosenblitt, International Trial of Major War Criminals. (Academy of Sciences of U.S.S.R.), (Moskva, 1950). This book is held in the National Library of Australia and is written entirely in the Russian language and no English translation of the book is available in Australia. I am relying on a verbal translation of a particular section of the book dealing with Webb's handling of the court, provided for me by a Mrs. Colan, an expatriate Russian, now resident in Canberra. Unfortunately, I do not have a page reference for the point made in the text.

On the question of Emperor guilt, Webb ran not only the risk of offending the Russians,[27] but the Americans as well. Webb had taken a strongly independent stand on the Emperor. Whereas it was MacArthur's view and the official policy of SCAP[28] that the Emperor did not bear sufficient responsibility for the war to be indicted, Webb took the opposite view, that Hirohito was, prima facie, guilty and should have been charged. American policy was anxious to preserve the institution of the Emperor as a major building block for the post war reconstruction of Japan. In the court room the main supporter of the view that the Emperor was guiltless was Joseph Keenan, Chief Counsel for the Prosecution. The issue of Hirohito's guilt or innocence did not arise directly, since the Emperor had not been indicted. But indirectly, Webb and Keenan came into conflict on the issue. The American response to Webb's views was hostile.[29]

The Australian response to Webb's Emperor statements was uneasy. A contemporary Australian forces minute paper made recommendations on the inclusion of Webb's controversial statements on the issue of Emperor guilt.

1. It is noted that a reference has been included on Page 2 of the draft to the fact that 'the Japanese Emperor was not charged'.

2. Normally, it would be undesirable to include the name of an individual as 'not charged' in an article of this nature. It is also obvious that, had he been charged and found guilty, his sentence would be included in Table No. 1 on Page 4 of the draft.
Furthermore, the immunity of the Japanese Emperor was a decision of policy on the highest level.

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27 Bergamini, Japan's Imperial Conspiracy, p.182.

28 Minear, Victors' Justice, p.111. Minear quotes MacArthur on his reasons for not wanting Hirohito indicted.

29 See Minear, Victors' Justice, p.164, for response of William J. Sebald, Chairman of the Allied Council. See also Minear at p.116 for the suggestion of Japanese Commentators that Webb's recall to Australia in 1947 was contrived by Keenan and MacArthur in response to Webb's stand on the Emperor.

3. However, the Judgement of the President of the International Military Tribunal for the Far East (Sir William Webb) states very definitely that this immunity of the Emperor, as contrasted with the part he played in launching the war in the Pacific, is something which the Tribunal must take into consideration in imposing sentences on the accused. On this ground, it may be reasonable to include the name of the Japanese Emperor.

4. The matter is raised for your consideration as to whether the point should be cleared with the Department of External Affairs. 30

Although it was prepared at the end of the proceedings, the Minute paper was a reflection of the sort of sensitivity that the issue of Emperor guilt, to take only one example, held for the Australian Government in her relations with other Allied governments. Indirectly, at least, Webb was under pressure not to embarrass Australia in his behaviour on the bench. This was the diplomatic aspect to Webb's role.

When Dr. Evatt made his pronouncement on the guilt of the Japanese on releasing the Webb Report, he put Webb, a man who believed firmly in the rule of law and the independence of his profession, in a compromising position indeed.[31] Webb was well aware that the Australian Government and, for that matter, the Allied population in general, expected the Tokyo Trial to be the instrument of a nemesis for the Japanese nation. It was a pressure that Webb had to square with his conscience.

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[30] Australian Military Forces Minute Paper, Subject: War Crimes Trials...Article for Australian Encyclopaedia. 'Webb Collection' (A.W.M.). The paper is unsigned and it is not clear to whom it was sent. However, space exists on the bottom right hand corner of the document for a signature of a Major General or an Adjutant General. The paper addresses itself simply to 'Secretary'.

[31] Webb may have been subjected to direct pressure from Evatt in his role as President of the Tribunal. According to Mr. David Sissons of the Department of International Relations, of Australian National University, it was widely rumoured in Australia at the time of the trial, that Evatt had 'tried to tell Webb what to do at the trial'. Mr. David Sissons, in conversation with me in May, 1975.

There was at least one other source of indirect pressure on Webb in his role as President of the Tribunal. The attempted permanent recall of Webb to the High Court was a distracting influence for a man who had strong and sustained demands placed upon his concentration in Tokyo.[32]

This, then was the context of politics external to the bench that Webb, along with the other judges, had to come to terms with. Whatever the meaning of Bernard's veiled reference to political interference in the formulation of the judgement,[33] it cannot be denied that the trial had a political aspect which manifested itself in their findings. In the conduct of the proceedings generally and in the judgement deliberations in particular, it was Webb, more than any other single judge, who bore the brunt of this pressure because he was the President. Against this background, I will now proceed to describe Webb's actual functioning as President of the I.M.T.F.F.E.

Webb's role had not been clearly defined in the Charter. In practice Webb fulfilled several functions. Foremost amongst these was that of judge responsible for making decisions on the bench as one judge among eleven. More important though, was his role as President. This involved two main functions. As spokesman for the Tribunal he carried the major responsibility for the day to day conduct of the proceedings. In addition, both inside and outside the Courtroom, Webb operated as an

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[32] In 1947, Sir John Latham had written to Webb: 'I can understand the difficulty of your position, being pressed on the one hand by the Government to return to Australia at an early date, and realizing on the other hand the nature of the responsibilities which you have undertaken as President of the International Military Tribunal'. Sir John Latham to Sir William Webb, October 29, 1947, 'Sir John Latham Papers'.

[33] The Defense quoted Bernard in their appeal to General MacArthur on the sentences. Minear, Victors' Justice, p.205.

informal chairman or organizer of the other judges. In this role, Webb was responsible for the unity and morale of the eleven judges hearing the charges. Of crucial importance in this second function as President was Webb's responsibility for ensuring that the Tribunal handed down a coherent, authoritative judgement at the conclusion of the proceedings.

It must be stressed that the full range of Webb's functions emerged, de facto, as the trial proceeded. To an extent, those functions not specifically spelt out in the Charter and adopted by Webb were implied in Webb's nominal position as President. But Webb exerted pressure to enact his role as President in the fullest sense. Webb was the dominant personality on the bench and he exerted a strong and controversial presence in the Courtroom.

Because Webb had adopted a complex multi-functional role not prescribed in any detail by the Charter, he was hampered by misunderstandings by his colleagues, both judges and counsel alike, as to exactly what his role was. Webb repeatedly stated his functions seeking to clarify his position as President of the Tribunal. On one such occasion, in Chambers, Webb, with some asperity, remarked, in seeking to illuminate his role as President for the benefit of defence and prosecution lawyers before him in Chambers,

> I'm afraid my position in this court is grossly misunderstood. One would think, reading the papers, that I am responsible for every decision and nobody else. In many decisions, on many occasions, I have been in the minority. 34

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34 'International Military Tribunal for the Far East. Proceedings in Chambers', October 4, 1946, 'Webb Collection' (AWM), Webb to Keenan.

The point raised here by Webb is of vital significance for the interpreter of Webb's role. Nominally, Webb was at all times speaking for the bench except where he specifically stated that he was expressing a personal view. That this was the case to a very considerable extent in practice can be seen in the transcript of the proceedings. Webb continually used the collective pronoun to refer to himself and his colleagues on the bench in making the rulings of the bench.

But equally clear from the transcript is the operation of Webb's discretion, a discretion checked, but not dominated, by the wishes of the other judges. Typically, Webb made a statement of his own view of a particular issue before the Court and then announced that he would consult his colleagues on the bench before proceeding further.

Important procedural matters were decided by a vote on the bench. Counsel for the defence and prosecution would make their respective submissions on the issue, the judges, under the supervision of Webb would vote, and Webb would announce the Tribunal's decision. In many of these decisions, Webb's vote was crucial because he was able to lodge a casting vote to break a tie in the voting on the bench. In this obvious sense, Webb's view on any particular matter, potentially carried more weight than that of any of his colleagues.

Webb's criticism of the press and the advocates at the trial over their misunderstanding of his role was less than fair since it could not always have been apparent in the Tribunal's rulings when Webb's influence was paramount and when a decision reflected a wider influence operating on the bench amongst the judges. Certainly this indicates a problem for those looking back on the trial from the present. A reading

of the transcript reveals very many decisions of the Tribunal where Webb's own views and the extent to which he was persuasive in that view is not clear, one way or the other. But in many other decisions, Webb's influence, a strong persuasive influence, can be easily seen from the bare transcript and from these instances the general trend of Webb's influence can be gauged.

Webb exerted his influence on the bench to produce, as far as possible, a maximum of speed and efficiency in the proceedings. In particular, Webb did this by keeping counsel for both the defence and prosecution strictly to matters relating to the charges against the Japanese. Throughout the proceedings Webb made repeated references to 'relevance' and 'probative value' in supervising the admissibility rulings of the Tribunal. In this sense Webb's notion of relevance and the procedure that was to be followed by the Tribunal, were closely tied.

Webb's influence operated to exclude evidence that, had it been admitted, would have served to throw the issue of aggressive war into a broader perspective and would have, in terms of Minear's argument, tended to produce a less unjust verdict.[35] Webb provided a general idea of his conception of relevance when he approved of the Tribunal's admissibility rulings in the following terms. In referring to the material

[35] Minear itemizes seven categories of evidence listed by Justice Pal in his judgement as having been excluded by the Tribunal. Minear supports the view of the defence in Tokyo that this evidence should not have been excluded. Minear, Victors' Justice, p.120. Altogether, Pal listed eleven categories of rejected evidence. Included in the remaining categories not cited by Minear was 'Statements prepared by the then Japanese Government for the Press'. Radhabinad Pal, International Military Tribunal for the Far East, Dissentient Judgement of Justice Pal, (Calcutta, 1953), pp. 155, 156.

that the bench had rejected as inadmissible, Webb said.

> Much of the rejected material might have had historical value, but none of us can deal with it. A judgement may itself be historic, yet its contents may be incomplete as history. 36

But a more specific idea of Webb's notion of relevance can be obtained by examining Webb's role in particular decisions made by the Tribunal on admissibility.

Webb, on occasion, stated which way he had voted on procedural decision made by the bench. This was so when the Tribunal rejected the first of nineteen excerpts from T.B. Powell's book My 25 Years in China, on Webb's casting vote.[37] The defence sought to introduce the excerpt as evidence throwing light on the internal affairs in China prior to the Japanese offensive there. More particularly, the defence sought to throw light on 'the specific affairs surrounding Japan internally and externally directly affecting Japan', so that the Tribunal could decide whether military training in Japan 'was necessary or...was for the promotion of an aggressive war'.[38] Webb expressly stated his own opinion before seeking the opinion of the other judges on the bench.

> What probative value have observations like this in a book by Mr. Powell? He is not a recognised historian. Should his matter be tendered here without any possibility of cross examination. 39

Later in the proceedings the defence offered similar evidence and this was also rejected on Webb's casting vote.[40]

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36 Webb 'Final Draft Judgement', Volume I, p.51a.

37 Proceedings, p.18408.

38 Proceedings, p.18406.

39 Proceedings, p.18407.

40 Appleman, Military Tribunals and International Crimes, (Indianapolis, 1954), p.253.

Where Webb did not expressly state what his attitude was to submissions from counsel, it is very often implied in his statements leading up to the Tribunal's decision. The Tribunal rejected numerous statements prepared by the Japanese Government for the press.[41] Webb commented on such a document: 'It seems to be nothing but argument from the Japanese viewpoint; propaganda in short'.[42] And again, when the defence sought to introduce as evidence an IPS document which was 'a report on Communist movements in Manchuria from 1917 to 1932',[43] Webb commented: 'I suppose they have a great collection of rubbish in IPS'.[44]

That Webb came to dominate the proceedings was inherent in his role as President. There was an element of fiction in the notion of Webb as objective monitor of the thoughts of ten judges from ten different national backgrounds as well as his own. Webb was not relaying the decisions of the bench as if they were mathematical formulae capable only of the narrowest interpretation. Webb had to interpret and transmit the decisions of the bench to the open court. Webb attempted this faithfully, but the element of subjectivity remained in his statements on behalf of the Tribunal. Inevitably, in this way, the character of the proceedings was shaped by Webb's thoughts and feelings. Not every single issue that arose was put to the vote. That would have made the trial unworkable. In countless numbers of routine decisions, Webb exercised sole discretion.

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41 Pal, Dissentient Judgement, p.155. Pal lists 14 instances where this occurred.

42 Proceedings, p.20802.

43 Proceedings, p.18401.

44 Proceedings, p.18402.

Little wonder then, that 'The President' and 'Tribunal' came to be almost synonomous in the minds of onlookers to the trial. The reference in Life Magazine to 'Webb's Tribunal',[45] was largely accurate in the degree of influence this phrase implied in Webb's conduct of the proceedings, though in the particular context in which it was used it was unfair to Webb.[46] The strength of Webb's presence in Court can be measured in the outburst of defence Attorney Ned Warren, at one stage in the proceedings, in response to a ruling by Webb on behalf of the Tribunal.

> Mr. President, you represent Australia, I'm appealing to the others on this bench. 47

Webb's influence in confining the evidence to that which was, in his view, strictly relevant to the charges, invoked considerable hostility from counsel from time to time throughout the trial. Webb's manner, in addressing the court was an aggravating factor. He was often terse, laconic, and reserved; there was little warmth in his delivery in court. The most notable and widely publicized of these courtroom exchanges occurred between Webb and Keenan and was so intense that it became known as the 'Webb-Keenan' feud. Life Magazine highlighted a particular clash between the two on an issue of relevance:

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45 'A "Dead Man" speaks, Tojo uses War Crimes Trial for an Appeal to Japanese Jingoism'. Life, (Chicago, January 26, 1948), p.88.

46 Butow, Tojo and the Coming of the War, (California, 1961), p.500, footnote 93.

47 Quoted in Walt Sheldon, The Honourable Conquerors. The Occupation of Japan 1945-1952, (New York, 1965), p.173.

> When Keenan sought to contrast the pre-war authority of the President of the U.S. and that of the Emperor of Japan, Webb challenged the relevance of his words and Keenan snapped back, 'Mr. President, if it is offensive...to let the people here know the authority of the President of the U.S. Government, I shall go immediately to something else'. Red-faced, Webb leaned across the bench and shouted, 'Go immediately to something else'. 48

Webb's idea of relevance worked against the Prosecution as well as the Defence. But by the end of the trial 'strict adherence to evidence and argument relating directly to the charges' had, arguably, resulted in an imbalance. The balance lay on the side of the Prosecution and against the Defence.[49]

To all outward appearances, at least, Webb was, for the most part, conducting a fair trial. A contemporary Japanese newspaper report commented on Webb's handling of the court,

> President Webb followed a policy of listening to all motions of prosecutors and defence counsels and reserving decisions for the majority of judges during recess...The trial... began to follow the normal Anglo-American style of proceedings in which the Chief Justice gives decisions only after he has heard every opinion and contention on the part of prosecutors and defence counsels.

As a general statement of Webb's method of handling the court, this press report was accurate. It does not, however, account for the imbalance in the proceedings stated above. Webb certainly gave both defence and prosecution, as far as was possible, an equal hearing. The injustice did not lie in

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48 'A "Dead Man" Speaks, Tojo uses War Crimes Trial for an Appeal to Japanese Jingoism'. Life, (Chicago, January 26, 1948), p.88-89.

49 Minear argues this. Minear, Victors' Justice, p.123.

50 'Tokyo Trial Recommenced Yesterday', The Mainichi Shimbun, June 4, 1946. An English translation is to be found in the 'Webb Collection' (A.W.M.) in a bundle of papers labelled, 'Japanese Press Reports 1946/1948'.

this aspect of the procedure followed by the court so much as in the restrictive nature of the actual decisions made by the court under the strong influence of Webb in hearing submissions from both sides.

A number of factors external to Webb had served to underscore Webb's inherent tendency to be restrictive in his approach to the issues raised by both defence and prosecution. The most obvious of these was the Charter itself, with its emphasis on efficiency and speed in the proceedings. But Webb's restrictive view of relevance was also, in part, a response to bench politics. The difficulty of reaching workable agreements on an eleven member bench tended to slow the proceedings and Webb attempted to compensate for this by keeping counsel strictly to issues relating directly to the indictment. Likewise, the proposed recall of Webb, by increasing the sense of urgency with which Webb viewed the need to conclude the proceedings as soon as possible, further prompted Webb to be restrictive in his interpretation of relevance.

But it is still necessary to explain why 'strict relevance' served to inhibit the defence more than the prosecution. It was Webb's pre-disposition to favour the prosecution's case itself which was the crucial factor in Webb's notion of strict relevance in conducting the proceedings. It is axiomatic that the notions of 'relevance' and 'probative value' formulated by the judges of the Tribunal existed in relation to the charges being heard. Each judge was, essentially, asking himself of any material submitted to the Tribunal by either prosecution or defence counsel, 'Is this material relevant to the charge of waging aggressive war?' As we have seen, 'aggressive war' was given no clear definition in Tokyo and it was left to the discretion of each judge to

decide for himself what aggressive war was. Now any decision as to what was relevant to a charge of waging aggressive war was inseparable from the notion of aggressive war itself. Inevitably each judge fell back upon a bias in making decisions on admissibility.

Behind Webb's deliberate attempt to be impartial in conducting the Tokyo Trial lay a subconscious belief that the Japanese had been morally wrong in waging aggressive war. The issue here merges with the broad theme of this thesis. Exactly how Webb's ethnocentric bias produced a faulty perspective on the issue of aggressive war is the subject of the remaining two chapters of this thesis. The point to establish here is that it was this same ethnocentric bias which inclined Webb towards the conduct of an unfair trial, by distorting Webb's perception of relevance in favour of the Prosecution.

So far I have dealt with Webb's role in the day to day conduct of the proceedings in open court. But a balanced account of Webb's role in a political trial must extend to Webb's functions behind the scenes in Tokyo. A major part of Webb's function had been as an organizer of the other judges.[51] To a considerable extent the judicial deliberations proceeded on Webb's initiative though this was truer earlier in

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[51] This is very clear from the 'Webb Collection'. Consider just two examples.

Webb to McDougal, June 27, 1946. 'I would appreciate a short memorandum setting forth your views on the Tribunal's jurisdiction to try the Japanese accused. I am already beginning to collect material for whatever judgement we may reach. I think our burden will be lightened if we make an early start'.

And, President to All Judges, April 1, 1947. 'I suggest that a conference of all judges be held tomorrow, Wednesday, April 2, at four o'clock in the conference room to consider the following matters.

1. Application of 6b to all defence affidavits.
2. Okawa's case.

the trial than it was during the closing stages. This was because late in the proceedings, Webb had stood outside a majority opinion. Webb modelled his behaviour as leader on the bench, on the function of a Chief Justice in Anglo-American courts. This role had carried with it, as far as Webb was concerned, the major responsibility for the production of the Tribunal's judgement.[52]

Webb's perception of the issues before the court was therefore of vital importance. This was not because Webb could in any sense direct the other judges in the formation of their opinions. He could not. But in practice Webb was responsible to see that the Tribunal did produce a comprehensive and coherent statement of its views. This was not easy since the judges came from widely different national, cultural and ethnic backgrounds and, not surprisingly, the degree of dissension was great. In fact, it was not clear until the very closing stages of the proceedings that a majority viewpoint would emerge. Webb had, as his first priority, the handing down of a majority judgement.[53] Failing that, it would have been necessary for each judge to hand down his own judgement. In that event, Webb thought the Tribunal could follow the Anglo-American practice where 'the Chief Justice writes the

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[52] Webb to all Judges, December 11, 1946, 'Webb Collection'. 'President to all Judges, Miscellaneous 1946-1947'. 'In the Australian courts, and I believe, in all British courts, the Chief Justice writes the leading judgement....'

[53] In this, in the early stages of the trial, Webb was bowing to the wish of nearly all the judges. Op.cit, last paragraph.

leading judgement, covering

> all the law and the facts, leaving other judges to agree with him or to write their own judgements. 54

Because Webb knew that the writing of a judgement of the Tribunal was likely to be a long and difficult task he was anxious to get the judgement deliberations in progress as soon as possible. To this end, Webb commenced, early in the proceedings, to draft a possible opinion of the majority on the issues of law raised by the defence early in the trial.[55] The draft was put forward as a basis for discussion only. In effect Webb set out to monitor the views of the other judges and to transcribe them into a single document.[56] Thus the judgement deliberations had begun very early in the trial with Webb playing the major role. The most important decisions on the law of the Tribunal were made in 1946 because without so deciding, the Tribunal could not proceed. These decisions were subsequently written into the full draft of the majority judgement.

Further into the proceedings, Webb had continued his initiative in the final drafting of a majority judgement. Again, Webb's primary role was to see that the Tribunal handed down a coherent and workable judgement. Webb proceeded to

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[54] Webb to Roling and McDougal, February 19, 1947. 'Webb Collection. 'President to all Judges, Miscellaneous 1946-1947'.

[55] Sir William Webb, 'Draft Judgement containing no findings of fact but only decisions on law points fully argued. It outlines the possible course of the judgement'. July 23, 1947, Draft 1 and 2.

[56] The President to all Judges, December 11, 1946, para.1. 'Webb Collection' (A.W.M.). 'President to all Judges, Miscellaneous 1946-1947, January/November 1948'.

write a leading judgement, a task which he considered his 'duty and privilege as President'.[57] In doing this Webb was keeping his options open since, in the event of the judges failing to agree upon a judgement amongst themselves, he wished his judgement to serve as either a leading judgement, or as a majority judgement, assuming that he could muster majority support around the views that he expressed in that document. Webb's draft judgement was therefore written as a 'fall back' document.[58]

But even while preparing his own draft he was negotiating with his colleagues on the drafting of a majority judgement. Early in 1948 Webb had formed a drafting committee together with Patrick and McDougal.[59] That was in February. By March of the same year, the difference between Webb and a majority of judges over the nature of conspiracy in international law had meant that Webb was obliged to withdraw from the drafting of the majority judgement and to delegate that task to those judges who had followed Patrick and McDougal in holding that

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[57] Webb to Roling and McDougal, February 19, 1947, para. 4. 'Webb Collection' (A.W.M.). In place cited above.

[58] Op.cit, para. 4 'In case we do not agree upon one judgement eventually, I am proceeding to write the leading judgement...This will be just as comprehensive as any judgement for the whole or a majority of the Tribunal'.

[59] The President to the Members of the United Kingdom and Canada, February 16, 1948, 'Webb Collection' (A.W.M.) 'I suggest we three members of the drafting committee each draft our views of the law and the facts, exchange them, and then meet with a view to making a majority draft...'

naked conspiracy was a crime in international law.[60]

Webb had no choice since the differing view that Webb took of conspiracy meant that his reasoning would have taken a fundamentally different course from that of the majority. Webb had either to persuade the majority to accept his view on conspiracy or withdraw from the deliberations. Since the majority was firmly committed to the view that naked conspiracy was a crime in international law Webb had no coice but to defer to the majority and to withdraw. For Webb to have persisted in a direct and immediate involvement in the majority deliberations would have meant that Webb would have been continually debating the issues at cross purposes with the other judges.[61] As Webb characterized the situation:

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[60] The President to All Judges, March 24, 1948. 'Webb Collection' (A.W.M.) 'President to All Judges, Miscellaneous 1946 to 1948'.
N.B. It is made clear in the later discussion in this chapter that conspiracy was not the only fundamental issue in which Webb differed from the majority. All the differences, collectively would have meant that Webb could not have proceeded to deliberate with the majority on a basis of a wide area of common understanding.
N.B. Webb in his correspondence simply refers to 'the majority' without specifying which judges he is referring to. It is clear from the preceding footnote that Patrick and McDougal were included in the majority. I am assuming on the basis of Minear's claim (Minear, Victors' Justice, p.89) that by the time of the judgement, the justices had split into a majority of seven with four individual dissenters and that the majority referred to in the 'Webb Collection' comprised, in addition to Patrick and McDougal, Zaryanov, Northcroft, Mei, Cramer and Jaranilla.

[61] In fact this was what happened in the Webb/Northcroft exchange in which Northcroft was arguing that the Japanese could not be convicted for actually waging aggressive war against Australia, New Zealand and the Netherlands, only of conspiracy to wage war. Webb contested Northcroft's argument.
See Chapter IV of this thesis for a discussion of this.

> As the majority are already committed to the view that conspiracy is a crime and the evidence will have to be carefully sifted to discover whether it supported the conspiracies alleged, I assume the majority will prepare their own judgement, not only as to the law, but also as to the facts, and also the materials for our deliberations. 62

But Webb did not then withdraw into a passive role as an outsider to the judgement deliberations.[63] He continued to work on his own draft as a 'back up' to the joint judgement being prepared by the majority and at the same time to oversee the latter, at a distance, since he was not directly involved in the judicial deliberations of the majority.

Furthermore, since it was necessary to muster as much support for his judgement amongst the judges as possible, if it was to constitute a viable alternative to the joint judgement, should that fail to eventuate, Webb continued to argue his case with his colleagues, including both those in, and those who stood outside, the majority. For example, Webb and Northcroft, the New Zealand member of the bench, took issue over the nature of the culpability of the Japanese in their conflict with Australia, New Zealand and the Netherlands. A full account of this debate occurs in the next chapter of this thesis. The point here is that Webb was, late in the deliberations, directly involved in a written debate with

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62 Webb to all Judges, March 24, 1948. 'Webb Collection' (A.W.M.) 'President to all Judges, Miscellaneous 1946 to 1948'.

63 N.B. The Defence appeal to General MacArthur had claimed that Webb, along with Pal, Bernard and Roling had been excluded from the judgement deliberations of the majority. See Defence Appeal to General MacArthur quoted in Minear, Victors' Justice, at p.206. My argument is that Webb was 'excluded' only in the weaker sense as outlined in the text of this thesis and that it would be misleading to read the appeal as implying that Webb's influence on the judicial deliberations was minimal.

a member of the majority on an issue of major importance to the Tribunal's findings.[64]

Webb's correspondence contains numerous examples of the deliberations that took place between Webb and his colleagues.[65] His most concerted attempt to influence his colleagues was his writing of the two volume draft judgement which he circulated amongst the members of the Tribunal. Webb poured much effort into this. In that document Webb presented a sustained and comprehensive statement of his views on the law and the facts of the case, both generally (Volume I) and with respect to the individual defendants (Volume II). It was the findings of fact which made up the bulk of both volumes. In Volume I Webb summarized his overall findings of fact under the heading 'Conclusions as to Japan's Responsibility for War'. In Volume II, after some preliminary statements on the law relating to his findings on the guilt or innocence of the defendants, Webb dealt with each of the accused in turn, outlining the role of each prior to and during the Pacific War in relation to the charges, and, in short concluding sections, Webb made his findings on the culpability of each defendant with respect to the counts on which he was charged. Webb concluded his draft judgement in Volume I with a statement on his sentencing policy.

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[64] Webb implies that this was just one example of the judgement deliberations of the bench when he prefaces an account of this debate in a deleted section in his final draft judgement. 'It was suggested at a late stage in our deliberations by a member of the Tribunal...' Webb 'Final Draft Judgement', Volume I, p.237. Certainly since the draft was prepared as a possible judgement of the majority, it would have been a matter of propriety to purport to speak for a plurality of judges in this way, but it is more likely in the light of the supporting evidence that Webb reflects the true state of affairs and is not simply 'keeping up appearances'. It is also highly unlikely that the use of the form first person plural was connected with the reason for deleting the passage.

Footnote 65

Consider just some examples from one bundle of the 'Webb Collection' alone:

Webb to Cramer, July 28, 1948.
Cramer to Webb, August 16, 1948.
Webb to Cramer, September 15, 1948.
Cramer to Webb, September 16, 1948.
Bernard to the President and all member of the Tribunal. (Subject: Remarks relative to the naked conspiracy), October 13, 1948.
Bernard to President and members of the Tribunal. (Subject: Chapter II(c). Formula on indictment of the drafted judgement of the majority), October 7, 1948.
Bernard to Webb, May 13, 1948. (Bernard suggested changes to Webb's draft judgement).
Bernard to the members of the Tribunal, May 10, 1948.
Jaranilla to Webb, September 16, 1948.
Jaranilla to the President and members of the I.M.T.F.F.E., August 3, 1948.
Webb to All Judges, May 14, 1948.
Webb to Jaranilla, May 14, 1948.
Jaranilla to all members of this International Tribunal, August 26, 1947.
Webb to Jaranilla, January 23
Jaranilla to Webb, January 22, 1947.
Webb to Ju-Ao-Mei, July 12, 1948.
Webb to Ju-Ao-Mei, June 28, 1948.
Webb to Ju-Ao-Mei, no date.
Ju-Ao-Mei to Webb, March 11, 1948 (Mei comments on Webb's draft judgement).
Webb to Ju-Ao-Mei, January 23, (Subject: first draft of possible majority judgement).

This correspondence related directly to the handing down of the Tribunal's judgement and is contained in the 'Webb Collection' (.A.W.M.) 'Miscellaneous Correpondence 1946/1948'. The full list is cited because these and other pieces of correspondence leave no doubt that Webb was involved in judicial deliberations. This thesis cannot hope to account for very much of the correspondence relating to Webb's role in the judgement deliberations, but readers are referred to these and other pieces of correspondence for support of my general statement that Webb's thinking was a significant influence on the judgement deliberations in Tokyo.

As the proceedings drew to a close Webb began to worry that the joint judgement would not be ready in time.[66] Therefore, in his capacity as President and as the man responsible for the production of a judgement, Webb began to pressure the majority to complete their judgement.[67] Webb circulated advice to all judges on the most effective way of going about the preparation of a judgement based on the mass of evidence submitted to the Tribunal.[68] His method, he claimed, would save weeks in the preparation of the document. At one stage, Webb even suggested that the joint judgement being prepared should be abandoned and that the Tribunal adopt Webb's draft as its own.[69] Webb suggested modifications to his draft that might make it more acceptable to the majority, but which would not compromise Webb's own views beyond the limit which Webb had set himself.[70]

In the end the joint judgement was prepared on time and Webb proceeded to read it in open court. The views expressed by the majority had not sufficiently diverged from Webb's own views for him to withhold his signature from that document.[71]

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66 Webb to All Judges, May 17, 1948. 'Webb Collection', (A.W.M.) 'President to All Judges, Miscellaneous 1946/1948'.

67 ibid.

68 The President to All Judges, May 14, 1948, 'Webb Collection' (A.W.M.). 'Miscellaneous Correspondence 1946/1948'.

69 Webb to All Judges, May 17, 1948, 'Webb Collection' (A.W.M.) 'President to All Judges, Miscellaneous 1946/1948'.

70 ibid, para. 5. 'Of course, I realize that a most valuable contribution to the joint judgement has been furnished by the member from China, but the substance of this could be embodied in my draft. So far, as appears in my 'Conclusions', I cannot find fault with the reasoning of the member from China (or of the member from the USSR).

71 Webb, Separate Concurring Opinion. In the first page of his foreword, Webb implies a sufficient degree of concurrence between himself and the majority for Webb to sign the joint judgement.

It was a difficult position for Webb because on the one hand he had seen the urgent need for compromise if the Tribunal was to produce a meaningful judgement at all, but on the other hand Webb had felt it necessary to take a firm stand on certain issues about which he felt very strongly. Webb had struck a balance between his views, those held strongly by him, and those held by the majority. Eventually Webb's conscience allowed him to put his signature to the majority judgement provided that he spoke out in his separate opinion on those issues about which he felt strongly. In this way he avoided compromising his notion of justice without failing in his responsibility for seeing that the Tribunal spoke with coherence and authority in handing down its verdict.

Webb may have been motivated to try to persuade the majority to his way of thinking for its own sake, because he believed that he was right and that he was morally obliged to persuade his colleagues to change their views. Undoubtedly, this was an element in Webb's thinking in the deliberations. But it is more likely that the major impact of Webb's thinking came as an indirect consequence of Webb's motive to see that the Tribunal did, in fact, produce an effective judgement. Whatever the case, it is certain that Webb's impact on the thinking of the judges during the final judgement deliberations, was significant.

In May 1948, Webb had written to his colleagues a statement which echoed his sentiments in the foreword to his Separate Concurring Opinion:

> The joint judgement now being so well prepared may be so acceptable to me when completed that I shall not think it necessary to write a separate judgement. 72

Now in view of the fact that Webb's colleagues were strongly aware of Webb's views,[73] and were also aware that Webb had stressed the need for compromise,[74] this statement must have had the effect of putting the majority under some pressure to incline towards Webb's point of view. If the President of the Tribunal had filed a separate judgement dissenting from the majority, either in whole or in part, that would have considerably weakened the overall effect of the Tribunal's judgement. In this sense then the statement by Webb may have had the effect of a veiled threat on the other members of the Tribunal. In the foreword to Webb's separate concurring opinion, Webb's tone is equally strong. Again Webb's initiative is strongly implied 'I suggested and they agreed...'[75] In any event because as a result of his strategy a high degree of correspondence existed between Webb's views and those of the majority, he saw fit to withdraw most of his judgement.

Certainly, Webb's differences from the majority are easily seen. Webb's separate opinion is really the difference between his full draft judgement and the judgement of the Tribunal. This was achieved by Webb by simply extracting the relevant sections, verbatim, from his draft judgement. The

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72 Webb to all Judges, May 20, 1948. 'Webb Collection', (A.W.M.) 'President to all Judges, Miscellaneous 1946/1948'.

73 See above. Webb had circulated a two volume judgement stating his views.

74 See discussion above. Bergamini says that Webb 'concurred in the judgement because, as President of the Tribunal, he felt he must set an example of compromise to discourage his colleagues from each handing down a separate opinion'. Bergamini, Japan's Imperial Conspiracy, p.182.

75 Webb, Separate Concurring Opinion, Foreword, p.1.

structure of the short judgement echoed, in broad outline, the structure of the full draft judgement. The law is dealt with, both generally, and with respect to the individual defendants. Likewise, there is a general findings of fact section, and a short section where Webb draws his conclusions as to the facts of the case.

Webb's differences from the majority are extremely significant and form part of Webb's impact on the thinking of the Tribunal. As a separate opinion they form part of the law of the Tribunal. Appleman says that Webb's judgement 'adds little to the field of international law'.[76] Be that as it may, Webb's judgement has acquired a significant status since it was written. The Defence cited Webb twice in their appeal to General MacArthur on the sentences imposed on the convicted Japanese.[77] It is likely that as Webb was the President of the Tribunal his opinion carried significant weight. Webb's divergent views expressed in his short judgement have also received a good deal of attention from observers and writers of the trial since.

In sum, Webb's functioning as President and as a judge of the Tribunal was central to the process of a political trial in Tokyo. Not only was Webb the main force in the day to day conduct of the proceedings, he was also the prime mover in the judgement deliberations.

Significantly, Webb sought, in the judgement deliberations, to influence the majority in the direction of impartiality and

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[76] Appleman, Military Tribunals and International Crimes, p.259.

[77] Defence Appeal to General MacArthur in Minear, Victors' Justice, at pp.205,206.

fairness in the procedure they were adopting in arriving at the verdict. Webb failed in this, but not without recording his dissent from the majority in his separate opinion over 'the method of approach to the ascertainment of the facts'.[78] Webb's statement was an oblique reference to the fact that he thought that the Tribunal's judgement should have been written with explicit reference to both prosecution and defence submissions. As the defence complained after the trial, the Tribunal, in their judgement, had given 'no indication that any of the evidence produced by the defence was taken into consideration. 'The entire verdict' the defence objected. 'was in the tone of the prosecution's summation'.[79] Webb had advised his colleagues referring to his own draft judgement,

> ...in the part of my draft headed 'Conclusions', I have taken note of the main Defence submissions. We must do that to be fair. 80

Webb was, as I have said, preparing his draft judgement as a possible judgement of the majority. Webb had been even more explicit in an earlier judgement circulated amongst the other members of the Tribunal.

> Justice and impartiality require, of course, that the members of the Tribunal should not be prejudiced and should not be personally hostile to the accused, and that they should thoroughly and objectively analyse the evidence to determine guilt or innocence. 81

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78 Webb, Separate Concurring Opinion, Foreword, p.1.

79 'Defence Appeal to General MacArthur', in Minear, Victors' Justice, p.205.

80 The President to all Judges, May 17, 1948, 'Webb Collection', (A.W.M.), 'President to All Judges, Miscellaneous, 1946/1948'.

81 Webb 'Draft Judgement containing no findings of fact but only decisions on law. Points fully argued. It outlines the possible course of the judgement'. Draft 2, July 23, 1947, p.23.

The puzzling feature, though, is that notwithstanding such advice, Webb was not, on balance, fair to the Japanese defendants in the substantive arguments with which he was greatly influencing the Tribunal's verdicts. Webb had generally supported the view that the Japanese were guilty of having waged aggressive war. The paradox in Webb's approach to justice in Tokyo is that stated in the first Chapter of this thesis and is only resolved through a thorough examination of Webb's thinking on aggressive war as it evolved during the proceedings.

I shall proceed, in the next chapter, to examine Webb's various draft judgements prepared by him during the proceedings, for they contain the record of Webb's attempt to determine the legality and the morality of aggressive war as it related to the actions of the twenty five Japanese defendants on trial in Tokyo. In Webb's judgement, we find the thinking that motivated Webb in all aspects of his function as judge and President and it is in this sense that they contain the key to an understanding of Webb's broader role at the trial.

CHAPTER IV

DEFINING AGGRESSION

Because Webb was the predominant figure in the Tokyo Trial the ambiguity with which he approached the focal issue of aggressive war lay at the centre of a 'Victors' Justice' in Tokyo. The question, 'What constitutes aggressive war?', which confronted the Tribunal, encompassed two distinct but related problems. What legal and moral right did the Allies have to try the Japanese for having waged aggressive war?; and if such a right did exist, what was the nature of that offence? In attempting to define the first aspect, early in the proceedings, Webb had difficulty in resolving in his own mind the basis of authority for the Tribunal, and, more broadly, whether aggressive war was, indeed, a crime in international law.

At the outset in the proceedings the defence contested the authority of the Tribunal. The prosecution was basing its right to hear the charges on several successive bases of authority already stated in Chapter III of this thesis. The Charter rested upon MacArthur's Proclamation and this in turn rested upon the Potsdam Declaration and the Instrument of Surrender. The ultimate and most general base of authority was international law generally.

Early in the proceedings, in response to the defence challenge, Webb proceeded, in an early draft judgement,[1] to

[1] Webb, 'Draft Judgement containing no findings of fact but only decisions on law points fully argued. It outlines the possible course of the judgement', July 23, 1947, 'Webb Collection' (A.W.M.), pp.20-21.
N.B. There are two drafts of this judgement. The second draft consists of the typewritten first draft, plus alterations and additions made in pencil. Both drafts are thirty nine pages long. This judgement has been cited earlier in Chapter III of this thesis.

explore the legal foundations upon which the Tribunal was based. Webb's reasoning was complicated and confused and did not lead to any clear proposition on the authority of the Tribunal. For example, at one point in the draft Webb mooted an objection to the authority of the Charter - that it depended for its authority upon an agreement between States (the Instrument of Surrender) enacted under duress.[2] Webb's reply to this objection was equivocal. Duress, Webb said, was not necessarily an invalidating factor in agreements between States under international law.[3] The pattern of Webb's reasoning was made up of a succession of stated challenges to the authority of the Charter followed in each case by a qualified and uncertain reply. Probably because Webb was uncertain over the right of the Allies to hear the charges, Webb, in the second draft of this judgement, abandoned his earlier line of reasoning and chose, instead, to rely directly on the authority of Nuremburg, which had upheld the authority of the Charter.[4]

Far more serious, however, was Webb's inconsistency when he came to decide whether aggressive war was a crime in international law. In fact, Webb did a complete about turn in his thinking.

When on June 12, 1946, Webb was preparing notes on the challenges in law raised by the defence in the opening stages

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[2] Webb, 'Draft Judgement' (Draft I), July 23, 1947, p.20.
[3] Webb, 'Draft Judgement' (Draft I), July 23, 1947, p.20.
[4] Webb, 'Draft Judgement' (Draft 2), July 23, 1947, p.20.

of the trial,[5] he posed the question 'Is aggressive war a crime' and proceeded to answer it[6] in the negative.

Webb rejected unequivocally Keenan's argument that the atrocious nature of war was evidence of its criminality on the grounds that such an argument was irrelevant in a court of law.[7] Webb accused Keenan of politicking in presenting the issue to the court.

> ...So that the whole of Mr. Keenan's argument based on the horrors of war, produces no legal results, although its political effect is considerable. 8

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[5] Webb, 'Notes on Certain Points of Law', Drafts 1 and 2, 'Webb Collection' (A.W.M.). In bundle of papers entitled 'President to all Judges, Miscellaneous. May 1946/Dec.1947, Jan./Nov. 1948'. Both drafts are contained in a bundle of 11 quarto sized pages stapled together. There is a rough draft version of Draft 1 (typed, but with alterations in pencil) and also a fair copy (typed alterations) which has been duplicated. The bundle contains only the original of the second draft in rough draft form (typed, witn alterations in pencil). Draft 1 leaves room for the stylus signature of Webb above the name, typed in block capitals, 'W.F. WEBB', and an instruction to a typist to that effect is attached on a small slip of paper stapled at the front of the entire bundle. Draft 2 carries no specific identification of the author but it is clear from the close relationship between the reasoning in both drafts 1 and 2, and from the style of the hand written alterations to that draft, that Webb was the author of both drafts. The puzzling feature is that, despite the fact that one draft is labelled 'Draft 2' it is prima facie, Draft 1 which is the more final draft.
I have therefore proceeded in the text of the thesis on the assumption that the fair (duplicated) copy of Draft 1 post dated the (rough) second draft. It is clear that the reasoning in these drafts was a forerunner to Webb's arguments in draft judgement on jurisdiction points (cited above) which came later in 1947. The only 'Notes on Certain Points of Law' draft which is dated is the second one. It is dated 12/6/46.

[6] Webb, 'Notes on Certain Points of Law', Draft 2, pp.1-4.

[7] Webb, 'Notes on Certain Points of Law', Draft 2, pp.1-2.

[8] Webb, 'Notes on Certain Points of Law', Draft 2, p.2.

Nor did Webb interpret the various international pacts on war formed in the 1920s as authoritative documents throwing light on the legal status of aggressive war in international law. Webb said of the Briand-Kellog Pact,

> When we compare this indefinite language with the earlier declarations of the Geneva Protocol and the League of Nations Resolution, we note a distinct modification of terms, which I think can only be associated with a purpose not to make the initiation of war criminal. 9

Of the Geneva Protocol, the League of Nations and the Pact of Paris considered together, Webb stated

> In the view that I take of these three documents, it is impossible for me to hold that the making of war is a crime in the legal sense. 10

Webb was reluctant to have the trial proceed on such an insecure legal basis. He worried that, since aggressive war was not a crime in international law, that the judges on the bench would be open to the charge that they had participated in 'judicial murders or lynchings'. [11]

But he did not conclude therefore that the Tokyo Trial should be abandoned. The court was still justified, in Webb's view, in hearing the charges of violations of the ordinary rules of warfare.[12] But in the event that the Tribunal did persist in hearing the charges relating to the general conduct of the war, Webb proceeded to outline contingency guidelines for the Allies to follow. He advocated that a treaty be

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[9] Webb, Notes on Certain Points of Law', Draft 2, p.2.

[10] Webb, 'Notes on Certain Points of Law', Draft 2, p.3.

[11] Webb, 'Notes on Certain Points of Law', Draft 2, p.5.

[12] By this Webb meant 'ordinary rules of warfare' as spelt out in the indictments.

concluded between Japan and the Allied Nations 'covering the position'.[13] Webb further recommended that it might be provided in the national legislatures of the Allied Powers that 'war crimes in the enlarged sense should be tried'[14] and that in addition they should provide for the method of trial. As part of these guidelines, Webb proceeded to offer two alternative courses open to the court as an interim measure until the gap in the law had been plugged by the relevant treaty provisions.

> Should the present trial in Tokyo conclude before the requisite treaty provisions have been arranged, there is no reason why any sentence passed should not be suspended pending the ratification by the treaties.[15]

And the second alternative

> ...that the Tribunal could proceed to make findings of fact on the assumption that aggressive war is a crime, but without so deciding. They could also state that on such assumption they would convict and what punishment they would impose. [16]

In fact, Webb was to adopt a course for himself in rendering judgement which was very close to the second alternative. He tried to take a middle course between that alternative and a firm finding that aggressive war was a crime in international law.[17]

However, while the trial was still in its early stages, Webb dramatically reversed his earlier view that aggressive war was not a crime in international law in favour of the opposite view, that aggressive war was, indeed an international crime

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13 Webb, 'Notes on Certain Points of Law', Draft 2, p.4.
14 Webb, 'Notes on Certain Points of Law', Draft 2, pp.4,5.
15 Webb, 'Notes on Certain Points of Law', Draft 2, p.5.
16 Webb, 'Notes on Certain Points of Law', Draft 2, p.5.
17 See below.

after all.[18] But this volte-face shift in Webb's opinion was not characterized by confidence on his part. From the outset of his change of mind he continued to reserve a doubt that the Pact of Paris had made aggressive war illegal.

> ...If the Kellog-Briand Pact was intended to make war a crime, it is remarkable that the one word sufficient to make that intention clear beyond doubt was not employed. The Pact does not employ the word 'crime' or any of its derivatives. 19

By the time of his final draft judgement, Webb had recast his reasoning supporting the illegality of waging aggressive war but the uncertainty remained, though it had been lessened, to a degree. Webb was still worried by the fact that the Pact of Paris did 'not contain the word "crime", or the word "criminal"', but he concluded that the language used by the Pact in 'solemn condemnation of war' meant that the 'illegality' and 'criminality' of aggressive war had been 'perceived and acknowledged' in that document.[20] Clearly Webb was qualifying his assertion that aggressive war was an international crime. In another context in the same final draft judgement Webb clearly reserved his final judgement on the status of aggressive war in international law.

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[18] Webb, 'Notes on Certain Points of Law', Draft 1, pp.1-6. N.B. Although draft 1 is not dated, it is obvious that it was written early in the proceedings since, as was the second draft, it was prepared in response to the preliminary objections in law to the constitution and jurisdiction of the Tribunal. Also, since the two drafts are stapled together in the 'Webb Collection' and are so closely related in content and reasoning, it seems reasonable to assume they were written close to each other in time.

[19] Webb, 'Notes on Certain Points of Law', Draft 1 (fair copy), p.3.

[20] Webb, 'Final Draft Judgement,' Volume I, p.14.

> I suggest that the Tribunal, in sparing the lives of these five men...took into account the fact that aggressive war was not unequivocally regarded as a justiciable crime when they made war. Many international lawyers of standing still take the view that in this regard the Pact of Paris made no difference. Unless the Japanese accused are to be treated with less consideration than the German accused, no Japanese accused should be sentenced to death for conspiracy to wage, or planning and preparing, or initiating, or waging aggressive war, if he is not also found guilty of grave war crimes or crimes against humanity. 21

Webb's view of the status of aggressive war in international law, as it emerged in his judgement writings, was, then, inconsistent. This inconsistency must be understood partly in terms of the politics of the situation in which Webb was placed. It is clear from the discussion in Chapter III of this thesis, that Webb was under pressure that would have made it extremely uncomfortable for him to find that aggressive war was not a crime. After all, to have concluded in the negative in this way would have deprived the Tribunal of its historic significance, to have reduced it to the status of an important conventional war crimes trial. Webb must have been aware of this and it is doubtful whether Webb was convinced by his own reasoning in his 'Notes on Certain Points of Law' where he argued that the Tribunal would have been justified in proceeding despite the reduction in the charges laid against the Japanese.[22] Those statements may be seen as a rationalization of his desire not to undermine the trial.

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[21] Webb, 'Final Draft Judgement', Volume II, p.271.

[22] See above.

In terms of the second alternative outlined in Webb's 'Notes on certain points of Law',[23] Webb had proceeded 'to make findings of fact on the assumption that aggressive war was a crime without so deciding,[24] beyond any doubt. Webb did not say whether this doubt made any difference to him in deciding whether or not to convict defendants but clearly it served as a major mitigating factor when he came to decide what punishment he would impose.[25]

In sum, Webb's stand on the status of aggressive war represented a compromise between the second alternative and the political necessity of finding that aggressive war was a crime in international law.

Having tentatively decided that aggressive war was a crime in international law, Webb then had the task of defining it. To do so without being certain that the crime existed, was little short of ludicrous and it is not surprising that Webb encountered difficulty since he was attempting to construct what was in effect a provisional definition of aggressive war. Webb's difficulty was magnified because Webb, in the interests of justice, had acknowledged the submissions of the defence, a process which tended to detract from the degree of confidence with which Webb stated his views. It was a 'shortcoming' the majority did not share. A lack of surety in his judgement was the price Webb had to pay for a fair and just approach to the issues before the court.

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[23] See above.

[24] Webb, 'Notes on Certain Points of Law', Draft 2, p.5.

[25] See below.

Webb's judgement presents an implied definition of aggressive war only. It emerged, piecemeal, in his large, findings of fact sections, both the general findings of fact section and the section which made findings of fact in the individual cases.[26] Webb's conclusion to the general findings of fact section is crucial since Webb therein presented a summary in which can be found the essentials of Webb's notion of aggressive war.

In his 'Conclusions Section' Webb dealt first with the Japanese offensive in China. In that section can be seen a basic idea in Webb's thinking on aggressive war. To counter the general claim by the defence that the Japanese had been provoked into a war of self defence by Allied demands that Japan surrender her China gains, Webb put forward an equally general rejection of that defence by arguing that once the Japanese had embarked upon one act of illegal aggression (in China) then any offensive by Japan to protect these gains could not constitute self defence in law.[27] Thus we have a 'chain reaction' theory of aggressive war. The Japanese offensive in Russia was illegal, because she was protecting illegally gained interests in China. And likewise her offensive against the U.S. and the other Allied nations generally to the south of Japan could not constitute self defence for the same reason. Webb stated this view as follows:

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[26] See the breakdown of Webb's Final Draft Judgement in Chapter III.

[27] Webb, 'Final Draft Judgement', Volume I, pp.229-238.

> If as I find, the Japanese attacked Chinese at Mukden without justification, then Japan had recourse to an illegal war...And if, as I find Japan had recourse to further wars, rather than give up her ill gotten gains in China, these further wars were also illegal. 28

In this way, Webb avoided resting his definition of aggression solely upon the intrinsic merits of each offensive in turn. It was therefore essential, if Webb was to construct a convincing account of Japanese aggression, that he establish a cogent argument that Japanese moves in China had constituted aggression. But Webb did not do this.

For example, Webb suspended judgement on whether Japanese moves into China, were illegal per se and rested his claim that the moves into China were illegal on the degree to which the Japanese had exploited that country.[29] The distinction in his mind between aggression and non-aggression was a blurred one indeed. Webb conceded defence claims that there had been instability in the administration of China prior to the Japanese advance there and that the economic restrictions placed on Japanese trade were such as 'might have driven her to retaliate'[30] but stated that these did not give Japan the right to invade and administer any part of China.[31] But Webb's argument was equivocal. Japan, he said in his final draft judgement,

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28 Webb, 'Final Draft Judgement', Volume I, p.51.

29 Webb, 'Final Draft Judgement', Volume I, pp.229-232.

30 Webb, 'Final Draft Judgement', Volume I, p.231.
N.B. Since Webb's separate concurring opinion consisted of sections taken verbatim from the full judgement, many of the references cited in this chapter are to be found in both judgements. Where there is a duplication, I will cite one or the other of the judgements, but not both. The choice, where I have a choice, will depend upon the arrangement I adopted for the noting of the judgements.

31 Webb, 'Final Draft Judgement', Volume I, p.231.

> took out of Manchuria all that she needed for her wars; and other parts of China that came under Japanese control were fully exploited. 32

Then, in a follow on in the draft which does not appear in the separate opinion, Webb said

> ...Had Japan been satisfied with that, it would have been a normal result of conquest, valid or invalid, in the circumstances of the time. 33

To that extent, Webb was saying, the Japanese moves in China, when considered in the broader context in which China was subject to the 'close and provocative civil and military supervision of foreigners',[34] were normal, if not necessarily morally justified. Webb suspended judgement at this stage as to whether these actions by the Japanese were legal or not (valid or invalid).

The line between aggression and non aggression was drawn by Webb in the China phase of the case, on two main grounds. The first was that the serious incidents that went to make up the instability in the administration of China and the Japanese offensive, were not causally connected.

> But the evidence reveals that the hostilities Japan resorted to and the other measures she took to increase her control over China originated in small incidents such as might have occurred in any well governed country, subject, as China was, to the close and provocative civil and military supervision of foreigners. 35

Here the logic of the argument began to strain against the reality of the situation as perceived by Webb. Webb had

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32 Webb, 'Final Draft Judgement', Volume I, p.232.

33 Webb, 'Final Draft Judgement', Volume I, p.232.

34 Webb, 'Final Draft Judgement, Volume I, p.230.

35 Webb, 'Final Draft Judgement', Volume I, p.230.

accepted the defence claim that instability existed in China. Webb's argument implied that Japanese actions in China might have been justified if they had been prompted by more serious incidents.

The second ground was that Japanese exploitation of China was distinct, in the 'circumstances of the time'[36] because it was extreme in degree. Japan had renounced or violated treaties limiting armaments and in addition Japan had by trafficking in narcotics,

> exploited a major vice to the moral and physical degradation of its victims for the purpose, among others of securing funds for the maintenance of the puppet governments working in her interest. 37

Webb's 'China argument' is therefore unconvincing. Unlike the majority, Webb set out to offer an explanation for his findings.[38] But the attempt did not achieve any large measure of success. Webb did not spell out any criterion for adjudging Japanese actions in China and no clear idea of 'Japanese aggression in China' emerged. In legal terms, Webb was assessing the evidence in the China phase of the case to decide whether it revealed 'authority, justification or excuse for what they (the Japanese) did'.[39] But Webb drew no precise distinction between incidents that would have justified Japanese intervention in China, and those which did not, or between exploitation which was justifiable, and that which was not.

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[36] Webb, 'Final Draft Judgement', Volume I, 232.

[37] Webb, 'Final Draft Judgement', Volume I, p.232.

[38] i.e. by weighing up both Prosecution and Defence submissions, see above.

[39] Webb Proceedings, (my phrase), p.2154.

Webb had based his findings in the China phase only on the evidence accepted by the Tribunal as having probative value. Had Webb been basing his arguments on a broader range of evidence his argument may well have taken a more definite shape.[40] His conclusions may have been different. It is not likely, though, that Webb was conscious of any constraint placed upon his reasoning because he had believed that a judge in his position should base his deliberations only on evidence strictly related to the charges. Other evidence may have historic value only. In adopting this approach Webb had failed to grasp the fact that to 'go by the book' in this way was unlikely to resolve the issues before the court because those issues themselves were historic of their nature.[41] This was a weakness which pervaded the whole of Webb's thinking on aggressive war as evidenced in his judgement. The results of this failure were clearly evident in this the most crucial phase of Webb's findings on aggressive war. As a result, the whole of Webb's 'Conclusions as to Japan's Responsibility for War' was weakened.

This can be further illustrated by examining Webb's conclusions for the Russian phase of the case. In considering the issues in the conflict between Japan and Russia Webb found

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[40] If only to the extent thatWebb could have made a more definite statement on the equivocal nature of aggressive war in international law. Compare Webb's judgement, for example, with his statements in Bergamini's book (see Chapter II of this thesis) where Webb openly states his doubt and bases this statement upon a comparison between Japan's quest for Empire and that of Britain in the nineteenth century.

[41] See Chapter I of this thesis.

in favour of Russia, but on the weaker quantum of proof.[42] Webb offered a qualified dismissal of the defence claim that the charges of aggression by Japan against Russia should be dismissed on the ground that the border between Russia and Manchuria was in doubt.[43] The Japanese had attacked at Nomohan where the border was 'tolerably clear'[44] and for this reason their attack at Chungkufeng 'could not lightly be dismissed on the ground that the border was in doubt.[45] The case against the Japanese was strengthened, though, on the basis of documentary evidence.

> Moreover, the documentary evidence from Japanese sources showing the hostile attitude of Japan towards the U.S.S.R. for years before and after this border fighting renders it far more likely than not that the Japanese attacks on the Soviet forces were not because of genuine claims that Manchuria had to the territory occupied by the Soviet and Mongolian forces but were as the Prosecution claimed, merely tests of the strength of Soviet and Mongolian forces at these points. [46]

In other words, at this stage in the argument there still existed a reasonable doubt as to the motive of the Japanese in attacking the Russians and hence whether those attacks were illegal or not.

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[42] Webb, 'Final Draft Judgement', Volume I, pp.232-234. N.B. The quantum of proof required in criminal cases in Anglo-Australian law is 'beyond all reasonable doubt'. It is the prosecution which, generally speaking, has the burden of that proof. This basic rule of procedure applied in the Tokyo Trial. There is a weaker quantum in Australian law which generally applies in civil cases. That quantum is usually expressly 'on the balance of probabilities' or 'more likely than not'.

[43] Webb, 'Final Draft Judgement', Volume I, pp.232-233.

[44] Webb, 'Final Draft Judgement', Volume I, p.233.

[45] Webb, 'Final Draft Judgement', Volume I, p.233.

[46] Webb, 'Final Draft Judgement', Volume I, p.233.

To satisfy the quantum of proof required to find the Japanese guilty of a criminal act, that of waging aggressive war against the Soviet Union, Webb then shifted his argument onto insecure ground.

> I have so far dealt with those border wars on the assumption that the Japanese forces were rightly in Manchuria. But they were there in the course of waging an illegal war against China and had no right to attack any other forces. 47

Webb had completed the statement above with the line 'unless they were first attacked'[48] but had checked himself and the line remained deleted in the final draft.

Webb's argument that the Japanese were guilty of waging aggressive war against Russia was therefore somewhat half-hearted. Indeed, he was really making a finding against the Japanese on a technicality; that defence of illegally acquired territory in the purely military, strategic sense was no defence in law.

But it cannot be concluded that Webb did not think the Japanese at least morally, if not legally, culpable, in that conflict. For Webb the 'crime'[49] of the Japanese in their conflict against Russia was more conspiracy to attack Russia than the actual attack itself. In 1948 Northcroft wrote, referring to a memorandum written by Webb on conspiracy,

> With respect, I think the President may be wrong when he asserts that the only case of bare conspiracy is in respect of Russia. 50

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47 Webb, 'Final Draft Judgement', Volume I, p.233.

48 Webb, 'Final Draft Judgement', Volume I, p.233. It is a minor point but it could be argued that this slip was symptomatic of the difficulty Webb was having in defining aggression and self defence.

49 'Crime' in the moral, not the legal sense. See below.

50 Northcroft to all Judges, September 13, 1948, 'Webb Collection' (A.W.M.), 'President to all Judges, 1946-1948'.

Northcroft thought that a bare conspiracy finding should apply also in the Tribunal's verdict on the Japanese conflict with Australia, New Zealand and the Netherlands.[51] Now Webb was, in drawing conclusions as to Japan's responsibility for her war with Russia, confronted with a dilemma of logic. As was pointed out in Chapter III of this thesis, early in the proceedings, Webb had held that there was no crime of naked conspiracy in international law. Webb believed that the Japanese had conspired to attack Russia but he could not find that such a conspiracy was criminal unless he also found that the Japanese had executed that conspiracy and actually attacked Russia and that meant finding that the Japanese were the aggressors against Russia in the so-called 'border wars'.[52] The dilemma placed Webb in an 'all-or-nothing position'. An in-between position which may have brought a finding in the strict legal sense of Japanese culpability more in line with the reality of the Russo-Japanese conflict as Webb saw it was denied him because it would not have been consistent with the rationale that he had built up earlier in the trial around his notion of conspiracy. And so, rather than making a finding of bare conspiracy having no legal effect Webb rationalized an uncertain belief that the Japanese were guilty of actual aggression against Russia. Replying to Northcroft's memorandum of September 13, 1948, Webb said,

> As to Russia, I held that conspiracy was executed in the border wars....[53]

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[51] See below.

[52] The phrase used by Webb. See below.

[53] 'The President' to All Judges, September 13, 1948'. 'Webb Collection' (A.W.M.), 'President to All Judges, Miscellaneous 1946-1948'.

The problem for Webb was that of giving precise and accurate legal expression to his basic belief that the Japanese had been morally wrong in their conflict with Russia. Webb had seen the degree of immorality in Japanese actions against Russia as lesser in degree than that in other phases of the case. Doubtless, Webb's anti-Russian bias served to diminish the extent to which he saw the Japanese as culpable. But ultimately, Webb gave effect to his personal belief that the Japanese had been morally wrong in that conflict and manufactured a rationale leading to the conclusion that the Japanese were guilty of actually waging aggressive war against Russia. In this sense Webb's logic succumbed to his sub-conscious bias against the Japanese. It is this which, primarily explains the artificiality and uncertainty in the passage in his 'Conclusions' Section of his judgement where he discussed the Russo-Japanese conflict.

Webb's general finding that the Japanese were guilty of actual aggression against Russia contrasts sharply with his findings for the individual defendants on the same charge. There were two counts of the indictment alleging aggression by Japan against Russia. They were counts thirty-five and thirty-six (aggression against Russia at Lake Khasan and Nomohan respectively). On either of these two counts, Webb found only one defendant guilty - Itagaki. He was found guilty by Webb on both counts.[54] This is a remarkable finding when it is considered that eleven defendants had been charged on count thirty-five and thirteen on count thirty-six.[55]

[54] Webb, 'Final Draft Judgement', Volume II, p.393.

[55] 'Verdicts and Sentences' (of the I.M.T.F.F.E.) in Minear, Victors' Justice, p.203.

In fact, the Tribunal[56] speaking through the majority judgement had found relatively few defendants guilty of these counts. Two were found guilty on count thirty-five and three on count thirty-six.[57] Galen Fox[58] suggests that the Tribunal as a whole compromised a belief that the Japanese were not guilty of actual aggression against Russia and the political necessity of a general guilty verdict against the Japanese by reducing the number of individual convictions.[59]

Certainly, to some extent Webb may have, in his findings in his 'Final Draft Judgement', been responding to political pressure. It seems likely that political pressure to find the Japanese guilty on the two counts in question reinforced a basic belief in Webb that the Japanese had been morally wrong in their conflict with Russia, conceived in more general terms. And so Webb made a general finding of guilty of conspiracy and actual aggression by the Japanese against Russia and then, because, as I have explained, he did not believe that actual aggression was the true offence committed by the Japanese, Webb either consciously or subconsciously compensated by finding the minimum number of defendants guilty on counts thirty-five and thirty-six. In this way

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[56] It must not be forgotten that the Tribunal's judgement carried Webb's signature. But, as I have stated earlier, Webb's signature of that document was to an extent, an exercise in compromise. It is Webb's individual judgements which reflect his true thoughts in the issues raised before the Tribunal.

[57] 'Verdicts and Sentences', in Minear, Victors' Justice, p.203.

[58] Galen Fox, 'The Nomohan Conflict in the Tokyo War Crimes Trial', (Ann Arbor, Michigan University, Microfilm, 1970). A copy is held in the Menzies Library, A.N.U., Canberra.

[59] Fox, 'The Nomohan Conflict...', p.101.

Webb appeased his conscience by giving legal expression to his perception of Japanese wrong doing against Russia, while avoiding any human sacrifice that might have resulted from such a rationalization.

Elsewhere in his conclusions Webb did not consider on their merits the Japanese offensives against other countries apart from Russia and China. There was no need for him to do so since once an offensive had been proved between Japan and any of these countries then the defence claim of self defence could not succeed because the Japanese were defending illegally acquired territory.

But that is not to say that Webb was comfortable in his notion of Japanese aggression with respect to these countries. Webb had deleted a passage from his final draft judgement dealing with a suggestion by a 'member of the Tribunal'.[60] That member had been Justice Northcroft, the member from New Zealand.[61] Northcroft had taken the view that it did not make sense to find the Japanese guilty of having actually waged aggressive war against Australia, New Zealand and the Netherlands when the declaration of war had come first from the three Allied nations.[62] The Japanese, Northcroft argued, could only be found guilty of conspiracy to wage aggressive war but not the war itself.[63] Northcroft placed emphasis on

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60 Webb, 'Final Draft Judgement', Volume I, p.237.

61 This is clear from the Webb-Northcroft correspondence dealt with above.

62 Northcroft to all judges, September 13, 1948. 'Webb Collection' (A.W.M.) 'President to all judges, Miscellaneous May 1946/Dec. 1947, Jan/Nov. 1948'.

63 ibid, Northcroft, para. 3.

the formal declaration of war as an ingredient in defining the act of aggression.[64] Webb and Northcroft were not disputing the culpability of the Japanese defendants in law but the precise nature of the offence committed.

Webb reacted strongly against this line of reasoning. In a 'behind the scenes' exchange of views, Webb debated this issue in a series of letters in the closing stages of the judgement deliberations. Webb originally intended to include a section in his final draft judgement in which he stated his views on the matter, but decided against it. The deleted section stands, though, as testimony of the process of Webb's thinking on a crucial aspect of the defining of aggression with respect to Japanese actions in the Pacific war.

In the debate both men did not place their essential argument in a context of international jurisprudence, but chose instead to root their thinking in parallel situations from domestic criminal law. Thus Northcroft sought to clarify his argument through the use of a simple analogy:

> Let me pose a situation which commonly arises in domestic courts. A in a quarrelsome, perhaps an intoxicated condition, meets in the street B, who is behaving quietly and properly. A starts to abuse B and seems likely to attack him. B feels certain that he is to be attacked and therefore strikes A. A fight ensues. What offences have A and B committed, if any? B, I suggest, has committed no offence - he acted in self defence in fear of attack from A. A committed the offence of (1) behaving in a disorderly manner, or (2) behaving in a threatening manner, or (3) behaving in a manner likely to cause a breach of the peace. A however

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[64] Ibid, Northcroft, para.3.
N.B. Compare Northcroft's notion of aggression implied in this correspondence with the definition attributed to the United States in Minear's book. Minear, Victors' Justice, p.56. 'An aggressor...is that state which is first to declare war...'

> should not be convicted of assault. He did not start the fight. He may not have hit B. When attacked by B he fought to defend himself....65

Clearly Northcroft was attempting a more discerning approach to the problem than Webb and was attempting a break down of the issue. Whereas Northcroft's approach was analytical, Webb's was not. Webb did not reply with a direct response to Northcroft's reasoning. Whereas Northcroft had seen a problem of some complexity, Webb had tended to see the issue in black and white. When Northcroft had initially raised the question[66] Webb had replied sarcastically.

> It is a revelation for me to learn that any member of the Tribunal thinks that the Netherlands and Australia attacked Japan and were the aggressors. 67

When Northcroft had attempted to clarify his argument, Webb's response was not perceptive. He began his memorandum with the bald statement:

> To say that the waging of war by Japan against the Netherlands, Australia and New Zealand was not a crime is to say that Japan acted in self defence, i.e. that those three allied powers were the aggressors. 68

Webb thus perceived the situation in terms of fixed categories of aggression and self defence. Webb's reasoning could be paraphrased thus. In an armed conflict between two countries,

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65 Northcroft to all Judges, September 14, 1948. 'Webb Collection' (A.W.M.), 'President to all Judges, Miscellaneous May 1946/Dec. 1947, Jan./Nov. 1948'.

66 Northcroft had raised the issue within the general context of a broader issue, the extent to which the evidence revealed instances of naked conspiracy by Japan. See discussion below.

67 Webb to all Judges, September 13, 1948. 'Webb Collection', (A.W.M.), 'President to all Judges, Miscellaneous May 1946/ Dec. 1947, Jan./Nov. 1948'.

68 Webb to all Judges, September 14, 1948, 'Webb Collection', (A.W.M.). In bundle of papers cited immediately above.

one country must be the aggressor, and the other the victim, acting in self defence. There is no in between. Northcroft specifically denied that his argument implied that the three allied countries were the aggressors and described this interpretation as 'absurd'.[69]

Webb's rejection of Northcroft's argument on the ground that the latter reversed the accepted version of the roles of aggressor and defender in the conflict between Japan and the three allied nations was more an emotional, political response than it was a rejection on strictly legal grounds.

In the deleted section of the draft judgement, Webb argued that Northcroft's suggestion overlooked the fact that there was evidence to show that the Japanese had intended to attack possessions of Britain, the U.S., the Netherlands, Australia and New Zealand.[70] The intention to attack on the part of the Japanese was, then, the essential thing for Webb, not the formal declaration of war, since that intention was in Webb's view inconsistent with an honest and reasonable belief on the part of the Japanese that the three allied countries intended to attack Japan.[71] Clearly Webb's

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69 Op.cit., Northcroft, para. 3.

70 Webb, 'Final Draft Judgement', Volume I, p.237.

71 Another fundamental assumption to be found in Anglo-Australian criminal law and which applied at the Tokyo Trial, was that the Prosecution must prove two main points to establish a criminal offence. Those aspects are: acteus reus (guilty act) and mens rea (guilty mind).
Webb was concerned with the mens rea in the above situation. It was necessary, Webb was saying, if the defence of justification by reason of self defence was to succeed, for the defendants to show that they 'honestly and reasonably believed' that the Allied countries concerned were about to attack them (The Present to all Judges, September 14, 1948, loc. cit.)

attitude was inflexible. It did not necessarily follow that an intention on the part of the Japanese to attack the three Allied countries was inconsistent with an honest and reasonable belief that the Allied countries would pre-empt their own attack. Of course, the whole issue was, and still is, open to debate. The point here is that Webb took a firm stand on the issue without sufficiently explaining his reasons. Webb attempted to treat the issue as though it were a simple one.[72] He was wrong in this. As Northcroft acknowledged, the position regarding the mens rea of the Japanese in this particular conflict was extremely complex.

It is clear from an examination of Webb's correspondence with Northcroft and the deleted section of Webb's draft judgement that he was worried that, by implication from an examination of the legality or otherwise of Japanese actions that adverse reflections would be cast upon the motives and behaviour of the three Allied countries concerned. This was a dominant consideration for Webb. It was an anxiety that was not shared to the same degree by Northcroft. And so, although it was not necessary to justify Allied actions since it was the Japanese not the Allies, who were on trial, Webb set out to justify the actions of the three Allied nations in declaring war on Japan.

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[72] Webb's tendency to oversimplify the issue can also be seen in his further attack on Northcroft on the ground of inconsistency. 'If the member for New Zealand suggests that the Japanese honestly and reasonably believed that these three powers were about to attack Japan, then does he make the same suggestion in respect to the United States and Great Britain. If not, why not?' (Webb to all Judges, September 14, 1948, loc.cit). Webb did not, in this, acknowledge the fact stressed by Northcroft, that there had been a prior declaration of war, on the part of the three Allies, in the conflict in question, but not in the case of the conflict between Japan and the United States and Great Britain.

> Of course, the three nations did not know the contents of the Japanese orders, but they rightly concluded that the Japanese attack would extend to them. Accordingly, they declared war on Japan, which was a strictly proper course in the circumstances. 73

Now this was not a comfortable assertion on the part of Webb from a moral point of view. Since he did not explain the reasons why the three Allied countries concluded that the Japanese would attack them, and since Webb had professed their ignorance of the orders indicating the specific intention on the part of the Japanese to attack, his statement seemed to imply that the means adopted by the three Allies had been justified by the end. Webb was really attempting to justify Allied actions by the result. The difficulty, acknowledged by Northcroft[74] and not by Webb, was that the Allies did not have certain fore-knowledge of an attack.

As had been the case in Webb's earlier argument that the Japanese had waged aggressive war against Russia, Webb in stating that the Japanese were the aggressors against Australia, New Zealand and the Netherlands was less than confident with an argument putting forward a notion of 'aggression' and 'self defence' on the merits of particular conflicts alone, and he proceeded to rest his argument that the Japanese were the aggressors and the three Allied countries the defenders on the central strand linking all his statements on aggressive war; that Japan was waging war to protect illegally acquired territory.

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73 Webb, 'Final Draft Judgement', Volume I, p.237.

74 The fact that the Allied countries had not had certain fore-knowledge of an attack had concerned Northcroft. 'If, for example, the attacks on Singapore and the Philippines had gone badly, Japan might not have ventured against the Netherlands East Indies at all'.
Northcroft to all Judges, September 13, 1948, loc.cit.

> But assuming Japan did not intend to attack the Netherlands, Australia or New Zealand, still any nation may attack an aggressor nation without committing a breach of the Pact of Paris. Moreover, the aggressor nation has no right to return the attack but, must surrender or desist from aggression...Japan in returning the attack was actually persisting in her original aggression... 75

In so doing, Webb partially acknowledged Northcroft's proposition that there was something odd about saying that a country was guilty of waging aggressive war when the 'victim' had declared war first. Webb acknowledged that the hostilities conducted by Japan against the three Allied countries were in some sense defensive. But, Webb argued, a plea of self defence in law could not succeed because they were defending illegally acquired territory.

Webb's view that no crime of naked conspiracy existed in international law did not prove any embarrassment to Webb in his exchange with Northcroft in the way it had when he was attempting to define the criminality of Japan's conflict with Russia. Webb genuinely believed that the Japanese were guilty of a conspiracy which had been executed in her conflict with Australia, New Zealand and the Netherlands. However, because both men assumed different notions of conspiracy without directly acknowledging that difference, the debate took on a quality of futility. Partly because the two men were reasoning from such fundamentally different premises there was no way in

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75 Webb, 'Final Draft Judgement', Volume I, p.17a.
This statement appears to be out of context in Webb's judgement. Placed, as it is in the early part of Volume I, where Webb was outlining his findings on the law of the case, it breaks the continuity of Webb's judgement. In fact, the material on page 17a is directly related to the 'Conclusions' section of Volume I (p.237), where Webb was discussing the issue he debated with Northcroft. Of course the statement cited here cannot be said to be misplaced, properly speaking, since the writing on both pages 17a and 237 has been deleted.

which their thinking could have converged in agreement. In the Webb-Northcroft debate much hinged upon the definition of words and apart from the fact that they were at variance in defining conspiracy, there was a more general lack of common understanding as to what each judge meant by a particular term. In any conflict between two nations both could be said to be behaving defensively in the sense that they are both defending their interests.[76] The question then becomes 'which has the legitimate interests?' The argument as to who is the real aggressor and who is the real victim is an a priori one depending on how you define 'attack' and 'defence'. In the context of the Webb-Northcroft exchange it was the law which defined these terms. But the law was ambiguous[77] and Webb and Northcroft took a different view of the law. To a very large extent, then, Webb and Northcroft were arguing at cross purposes, though their difference in part must have rested upon a differing perception of the reality of the situation. This led Webb into confused contortions of logic and definition which was more likely to hinder rather than help, a resolution of the issue between the two judges. Consider again the following statement by Webb:

> Japan, in returning the attack was actually persisting in her original aggression....78

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[76] See Robert Tucker, The Just War (Baltimore, 1969). The whole book is an examination of the American doctrine of the just war and is useful background reading on the general theme of aggressive war.
See especially Section II 'On the Justice of Defensive War', pp.97-164. On page 126, in a footnote, Tucker says: '...aggression is to each nation roughly identical with those acts of other nations, which, taken collectively, may threaten what each nation conceives to be its "vital interests" '.

[77] See Chapter III of this thesis.

[78] See above.

In adhering to the chain reaction logic of making the unlawful nature of each offensive depend upon the illegality of a prior offensive, Webb distorted the ordinary lay meaning of 'attack' and 'defence'.

Webb was certainly conscious of the need to be logical in his debate with Northcroft. He said,

> The view that aggressive war is illegal and criminal must be carried to its logical conclusion.... 79

But Webb's reasoning on aggressive war was based upon confused initial premises and so logical deductions that fitted the reality of the Japanese conflict with Australia, New Zealand and the Netherlands East Indies proved extremely difficult for him. Certainly he was not prepared to commit himself in his judgement on the issues he debated with Northcroft, and the deleted section stands as mute testimony to the tremendous difficulty Webb had in defining aggression in that phase of the case.

In Webb's reaction to Northcroft's argument we can see the confusion which lay at the centre of an unjust trial. Despite himself, Webb violated the most fundamental principle of any Anglo-American criminal trial; that the accused were to be assumed innocent until proven guilty. To the contrary, a subconscious presumption of Japanese war guilt underlay all Webb's thinking at the trial. This presumption of guilt led Webb into a contradictory line of reasoning. Webb was saying; if B is behaving defensively with respect to A's actions, then it necessiarly follows that A is an aggressor. This argument

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79 Webb, 'Final Draft Judgement', Volume I, p.17a.

was invalid. Certainly, in this hypothetical situation it necessarily follows that A is in some sense an attacker. But the legality and morality of A's attack is still open to question. A might, for example, have been conducting a pre-emptive attack.[80] It is conceivable that A may be in no way legally or morally culpable. Or as was the case in Northcroft's analogy cited above, A may be culpable in some lesser sense.

But Webb's reasoning was fallacious on other grounds. In putting forward a plea of self-defence at the trial the Japanese had only to raise a reasonable doubt in the prosecution's case that they were guilty of waging aggressive war.[81] An acquittal of the Japanese would have, therefore, carried no necessary implication in any strict legal or moral sense, that the Allies were aggressors. Webb's anxiety on that score would only have been justified if the defence were required to establish their case as a certainty, or a near certainty.

Of course 'reasonable doubt' was the minimum quantum of proof required of the defence. It was open to the defence to make their case as strong as possible. But at no stage in the trial did the defence appear to be establishing their claim of self defence as a certainty, or near certainty. Webb's claim that an acquittal of the Japanese on a charge of aggressive war necessarily implied that the Allies were the aggressors was ill founded in terms of the actual strength of the defence

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[80] See Tucker, The Just War, pp.142-145, for a discussion of the notion of 'pre-emptive attack'.

[81] In Australian domestic criminal law this is usually expressed in these terms: the defence in putting forward self defence as a justification of the accused's actions, is saddled with an evidentiary burden of proof. This entails a relatively small quantum of proof, smaller than 'on the balance of probability' and 'beyond all reasonable doubt'. Colin Howard, Australian Criminal Law, 1st edition, (Australia, 1965), pp.18,19.

case. In any event, the Tribunal could have produced no direct finding on the legality of Allied actions. It was the Japanese who were on trial in Tokyo, not the Allies. But the significant point here is that an acquittal in Tokyo would have left the issue of the morality and legality of Allied actions in the war open to question. This is the crucial point in understanding Webb's response to Northcroft's arguments. An acquittal at the trial would have undermined a strong belief in Webb and the Allied population in general, that the Japanese had been aggressors and the Allies defenders in the second world war.

In the Webb/Northcroft exchange, then, we can see the operation of the central dilemma in all Webb's thinking on aggressive war at the trial. That dilemma took the form of a conflict between a belief in the principle of a fair trial and a subconscious belief that the Japanese had been morally wrong in waging war. On the one hand, Webb's conscience told him that he should 'thoroughly and objectively analyze the evidence to determine guilt or innocence',[82] but on the other hand Webb felt that the Japanese offensive was immoral. This conflict was further complicated by the operation of political pressure which generally, though not always, tended to reinforce Webb's bias against the Japanese.[83]

This conflict operated right throughout the proceedings to produce uncertainty and inconsistency in Webb's thinking on aggressive war. On balance, Webb's bias proved the

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[82] Webb, 'Draft Judgement' (Draft 2), July 23, 1947, p.23. 'Webb Collection' (A.W.M.).

[83] The political pressure on Webb to accept the Allied policy decision not to indict the Emperor of Japan was a notable example of political pressure running counter to Webb's anti-Japanese bias. See above.

stronger influence over his judicial ethics and he was drawn into the conduct of a political trial. Thus, although the conflict took on a particularly sharp focus in the Webb/ Northcroft exchange, it was in a more general sense the conflict from which 'victors' justice' stemmed in Tokyo. Webb's failure to resolve the dilemma was his own failure as a judge in the first instance, but it was the primary cause of the Tribunal's failure to be just also, because Webb's influence was paramount in the conduct of the proceedings and in the preparation of the Tribunal's judgement.

CHAPTER V

CONCLUSION

If Webb's perceptual failure was central to the process of a political trial by virtue of his paramount influence on the proceedings, the essential cause of that confusion - the conflict between Webb's judicial ethics and his deep-seated bias - reflected the wider contradiction in the Allies as a whole in their approach to the trial in Tokyo.

In a sense 'Victors' justice' was inevitable in Tokyo because the trial proceeded on a false assumption; that a fair trial would necessarily vindicate their own conduct in the war and condemn that of the Japanese. The Allies had fought the war for the preservation of the Western democratic way of life. As if to assert the moral supremacy of Western democratic culture the Allies put on a display of a vital institution in that culture - the just and fair trial. But it was just such a trial which was capable of airing both sides of an issue. Generally speaking, however, the Allies had assumed that there was just one side to the question of aggression in the Pacific conflict. They assumed the rightness of their own actions and the wrongness of those of the Japanese. But as we have seen the defence at the trial did its job well and the alternative view of the Pacific war - the view that the Japanese aspirations to empire were not substantially different from other nations, that a certain amount of aggression by Japan was normal, 'in the circumstances of the time',[1] that

[1] The phrase used by Webb. See above in Chapter IV for a discussion of Webb's claim, made in response to defence arguments, that Japanese exploitation of Manchuria, for war purposes, was not out of tune with the war preparations being made by other nations, though Japan had taken her own preparations to an extreme in degree.

in a very real sense the Japanese had been behaving defensively in the Pacific war - began to emerge with disturbing consequences for the Allies. Faced, then, with two contradictory beliefs, that 'due process of law' must be allowed to run its course and a belief that the Allies had fought on the side of good, the victors were faced with a dilemma. Should they allow the truly objective view of the war to be reflected in their verdicts with the terrible impact that this would have had on Allied public morale; or should they steer the proceedings towards a politically acceptable verdict? In fact the latter choice whether consciously or subconsciously was taken and the 'motives low'[2] stated by Minear and cited in the first chapter of this thesis came to predominate.

In this way, then, a political trial stemmed from two contradictory assumptions held by the Allies. To say this, is of course, only to identify in broad outline the fundamental cause of a political trial. A definitive understanding of the fundamental ideological cause of 'Victors' justice' can only come through a close examination of the particular form the conflict between the ideal of justice and an anti-Japanese bias took in the major protagonists of the trial. But it is an understanding of Webb's failure to resolve the conflict that is most significant in comprehending the broader dilemma which gave rise to a political trial. For 'Victors' justice' was to a very considerable extent, 'Webb's justice'; injustice in Tokyo was, in a very meaningful sense, the product of 'Webb's Tribunal'. The root of a political trial lay very much in the bias of one man - the Chief Presider of the Tokyo Trial.

[2] See Chapter I of this thesis.

Before proceeding to summarize and consolidate my argument, it is appropriate, therefore, to demonstrate in some detail, Webb's bias against the Japanese, a bias so far assumed in this thesis, and the way in which it operated to confuse Webb's thinking on aggressive war.

Even when Webb was outlining the material facts of the case as he found them in his 'Final Draft Judgement', Webb's feeling that the Japanese attempt to build her Greater East Asia Co-Prosperity Sphere was immoral, was clearly discernible. It goes without saying that the exercise of fact finding was meant to be conducted with strict neutrality. But Webb's bias was too strong and Webb's anti-Japanese bias surfaced to produce a marked inconsistency in the tone and feeling of this section of his judgement.

On Page 226 of his 'Final Draft Judgement', Webb outlined his findings as to the material facts on Japan's attempt to build the Greater East Asia Co-Prosperity Sphere under the heading 'Japan as Leader of Asia'. Webb for the most part of this section discussed Japan's aims in a relatively objective view.

> On 14 December, 1941, a plan for managing the southern areas was formulated to guarantee the security of Japan as Leader of Asia. [3]

To this end, Webb continued, Japanese policy was 'to acquire bases', to, 'tighten economic co-operation', and 'to sever political ties with Western powers'.[4]

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[3] Webb, 'Final Draft Judgement', Volume II, p.226.

[4] Ibid.

Thus far in this passage Webb's bias was under control and there was no apparent distortion of the aims of the 1941 Japanese ministry. But in the following sentence, Webb's objectivity broke down.

> Independence was to be granted only when and where Japan decreed fit. 5

This was less a statement of fact than a value judgement on the Japanese policy of granting independence to the nations that had been 'incorporated'[6] into the Greater East Asia Co-Prosperity Sphere. There was no conscious irony in Webb's implied objection to Japan's failure to plan for the immediate granting of independence to countries in the Southern area - Indonesia, for example, or Malaya, which were under direct European control at the time of the Japanese attack. The same inconsistency applied at a subconscious level to Webb's objection to Japanese plans which failed to provide for the granting of complete independence of the Philippines and Indonesia.

> Japan would control the Philippines and the Indonesian Federation even after independence had been granted. 7

The fact here was that Japan was to retain control of two countries after independence had been granted. It is the word 'even' which betrays Webb's personal opinion that this was morally wrong.

Webb continued to outline Japanese plans for control of South East Asia on the following page. Again Webb was choosing

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5 Ibid.

6 The word used by Webb in describing Japanese aims for the acquisition of the Netherlands East Indies, Singapore, Malaya, British North Borneo and Sarawak. Ibid.

7 Ibid.

his words and phrases carefully. Tojo's Cabinet decided upon a policy of 'territorial incorporation'.[8] But when stating that Koiso had announced in the Diet that it had been decided to grant independence to the Netherlands East Indies, Webb followed with the statement, 'Still it had not been granted when Japan surrendered'.[9] The implied disapproval of the failure to grant independence to the Dutch East Indies is obvious.

Webb used terms such as 'acquiring'[10] and 'annexation'[11] in describing Japanese aims with respect to the building of her empire. But when he described the implementation of those aims his language was stronger.

After conquering Malaya and Burma... [12]

This inconsistency in language, though less in degree than that in the examples cited above, clearly implied a non-acceptance of the aims of the Japanese War Ministry.

Many such examples could be cited. They recur right throughout Webb's judgement to reveal a fundamental belief that the Japanese were aggressors. It was precisely because Webb was purporting to state the facts objectively that these 'lapses' stand out so clearly.

Webb's concluding observation to his findings under the heading 'Great East Asia Ministry' read as follows:

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[8] Ibid, p.227.
[9] Ibid.
[10] See above.
[11] Ibid.
[12] Ibid.

> Japan exploited the N.E.I. (Netherlands East Indies) economically and politically. All Dutch influence was eliminated and measures taken to ensure Japanese control and domination of the N.E.I. as part of the Japanese Empire. 13

Now it is clear from this that Webb accepted Dutch dominance in that area. The word 'exploited' is not a neutral term. It has a strong moral connotation. And again the language used here betrayed no sense of irony in speaking of Japanese exploitation and the elimination of Dutch 'influence' in the same paragraph.

In fact, Webb's entire judgement was based upon an acceptance of the rightness of the European hegemony in the areas subsequently occupied by the Japanese in the war. Webb's perception of the pre-war world order, as it was implied in his judgement, was one in which the American fleet had a rightful place well beyond America's national boundaries in Hawaii,[14] in which the phrases 'French Indo China'[15] and 'Dutch East Indies' carried no implication of a prior (to the Japanese attack) conquest of an indigenous population by Western imperialist powers. Likewise, to Webb the phrase 'British Commonwealth' implied a legitimate relationship between Britain and her former possessions. Indeed Webb closely identified himself with that Commonwealth. At one stage in the proceedings, Webb went out of his way to identify himself

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13 Ibid, p.228.

14 e.g. Webb, Separate Concurring Opinion, p.236. 'Japan's fleet...was able to destroy or disable...a great part of the American fleet thousands of miles away in Hawaii'.

15 e.g. Ibid, p.234. Passage beginning, 'The moves by Japan against French Indo-China....'

as an Anglo-Australian judge.[16] And his identification with the British Commonwealth against the Japanese as a 'threatening group' can be clearly seen in Webb's statement,

> ...but the British Commonwealth was still alone in the struggle. 17

Webb was referring to the conflict between the British Commonwealth countries and Japan. The phrase has an emotionalism which echoed the tone of the racist, anti-Japanese propaganda produced by the government in wartime Australia.

Clearly then Webb's bias as it was revealed in his judgement took the form of an imperial awareness as I have described it in Chapter I, which arose directly from the ethnocentric phenomenon in Australian society. Webb's bias was ingrained in his character. The moral assumptions with which Webb approached the central issue of aggressive war arose directly from his cultural heritage.

Webb had been able to overcome his bias to a degree. That this was so is clear from Webb's own statements in Bergamini's book.[18] On a superficial view there is difficulty in reconciling Webb's claim in his introduction that he seriously considered the defence claim that Japan was behaving as any nation would have in the same circumstances in attacking the Allies, with his statements at the trial. Nowhere in his judgement are his doubts on the morality of the Japanese role in the war stated openly. That is not surprising. As we have

16 W. Sheldon, The Honourable Conquerors, p.173.

17 Webb, Separate Concurring Opinion, p.234.

18 See above in Chapter II.

seen, there was not the scope at the trial for Webb to debate the morality of the war. Webb was solely concerned with the legality of Japanese actions and anything outside that was irrelevant. In any case, it is clear from Webb's introduction that, even by the time he was nearing the end of his life, he had not resolved the moral dilemma posed by the issue of aggressive war at the trial. But in some stages of his judgement Webb's bias did seem less in degree and the language and phrasing by Webb did suggest that he was seriously considering the defence submissions. It is in these passages that Webb can be seen to be partially overcoming his bias, though to no really positive effect.

This was so in the China phase of the case. In Webb's judgement where he was attempting to outline the nature of aggression in China,[19] Webb's tone suggested an attempt at a sophisticated world view - an attempt which was only parly successful. Webb acknowledged that the China that Japan entered was unstable in its administration and very indirectly, that this was in part due to the presence of European powers as well as that of the Japanese. China, Webb said, had been subject to 'the close and provocative supervision of foreigners'.[20] In the same section he made reference to the findings of the Lytton Report[21] and the Nine Power Pact[22] and in so doing implied an awareness of the European presence in China. Webb did not deal directly with the European role in China because

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19 Cited above in Chapter IV.

20 Cited above in Chapter IV.

21 Webb, 'Final Draft Judgement', p.230.

22 ibid.

it was not relevant. Webb would have relegated the fact of the European presence to those matters having purely historic significance. But the effect of Webb's acknowledgement of the defence claim that the instability in the administration offered a justification for the Japanese offensive there was to lend to his judgement an awareness of real politik of the situation in a manner which implied a limited degree of success in overcoming his bias against the Japanese. Unlike the majority in their judgement, at least Webb thought the defence arguments worth considering. But he did not accept the defence arguments and he did not take up any firm moral or legal stance one way or the other. The sense of Webb's argument was that the Japanese were aggressors in China but the tone was uncertain. Webb was still biased against the Japanese but he was insecure in the feeling that the Japanese presence in China was morally wrong. Webb's tone in that section of his judgement was that of a man who felt that the Japanese presence in China was wrong but whose better judgement suggested that there was an inconsistency in convicting the Japanese for imperialist activities which were not different in kind from those of the European powers both in China and elsewhere. Hence his statement that the Japanese exploitation of Manchuria for war purposes was 'normal' in 'the circumstances of the time'.[23] As a result of a partially overcome bias, no clear perception of 'right war' and 'wrong war' emerged in Webb's thinking on the Japanese offensive in China.

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[23] Cited above in Chapter IV.

If Webb was able to achieve a degree of objectivity in considering the Sino-Japanese conflict, he was totally unable to be impartial in his debate with Northcroft.[24] Bias greatly diminished the flexibility of Webb's logic in considering the meaning of aggression as it applied to the conflict between Japan and Australia, New Zealand and the Netherlands. Perhaps because that conflict took place on and around Australia's shore line Webb's ethnocentric bias was greatly intensified and he was unable to approach the degree of impartiality exhibited in statements on Japanese aggression in China. For this reason Webb was unable to see beyond fixed categories of aggression and self defence. In the Australian imperial consciousness there was no concept of an offensive move southwards which was not aggressive of its nature.[25] And so Northcroft's suggestion that the Japanese offensive against Australia, New Zealand, and the Netherlands was in some sense defensive, was incomprehensible to Webb. Northcroft's suggestion shook to their very foundations the basic assumptions with which Webb had gone to the trial. Whereas Webb had clearly been attempting to transcend his bias, Northcroft's memorandum had confronted Webb's concept of the international world order, head on. Accordingly, Webb's objectivity collapsed and he was forced to take refuge in his pre-war assumptions. Webb found himself unable to respond in any other than black and white terms to the issue put forward by Northcroft in the judgement deliberations.

[24] See above in Chapter IV.

[25] See above in Chapter I for a brief discussion of the neurotic fear of Australians of the 'threat from the north'. It follows from the very irrationality of this fear that a concept of a defensive move southwards in any sense could not easily be held by Australians.

This would explain the emotional nature of Webb's response. That response indicated that Webb saw Northcroft's suggestion as implying an inversion of the international world order as Webb assumed it prior to the trial. It was an inversion which turned notions of 'right' and 'wrong' in the behaviour of nations on its head. Aggressors became victims and victims became aggressors. It must be stressed that such an inversion did not follow as a matter of strict logical necessity from Northcroft's suggestion, but Webb thought it did. It was in this exchange that Webb's fundamental cultural bias had its strongest effect upon Webb's reasoning. The unstated initial 'premise' in Webb's reasoning was that any threat to the European hegemony in the Pacific area was morally wrong of its nature. It was an assumption Webb held before he brought his cognitive faculties to bear on the issue, and it remained in varying intensity throughout the trial to shape Webb's thought pattern on aggressive war. Such an assumption was not properly speaking a premise since it took on no concrete formulation, but it was the basic assumption from which Webb's thinking flowed. It was in his debate with Northcroft that Webb achieved least independence from his imperial consciousness and in which the effect of bias in producing 'Victors' Justice' was most clearly evident.

Webb's bias in his exchange with Northcroft can be more readily understood through a contrast with the fundamental assumptions of Justice Pal in his thinking in the same phase of the case which gave rise to the Webb/Northcroft debate. Part of Pal's judgement was an examination of evidence submitted to the Tribunal to see whether such evidence supported the charge that the Japanese had conspired to attack the Netherlands

East Indies. Unlike both Webb and Northcroft Pal did not think that the evidence supported a finding that the Japanese were guilty of such a conspiracy. But it is Pal's reasons for so deciding that are of relevance for they can serve to throw Webb's fundamental assumptions on empire in the South Pacific phase of the case into relief. Whereas Webb was inclined to see a fixed status quo in that area of the Pacific, one comprised of a European domination of an indigenous population and resources in Indonesia, Pal was able to achieve a broader historical perspective unhindered by an acceptance of such a European presence. To Pal, the Japanese imperialist aims were in kind no different from those of the Western powers who had built an empire before her.

> The Western Powers in their enterprise of sustained industrial and commercial expansion could proceed on a 'tacit assumption that a certain measure of world-wide political good sense and good will and moderation could be taken for granted'. The fact that the field was now occupied by the Western Powers should not exclude the possibility of such an assumption on the part of a new enterprise. 26

Now Webb was fundamentally disinclined to accept this view of Pal's. Webb accepted the motives and actions of European colonizers but not those of the Japanese.

Bias was likewise the most significant factor influencing Webb's thinking in the Russian phase of the case. Implied in Webb's findings, discussed in Chapter IV above, was an implicit acceptance of the claims of Russia, a European Power, to a status quo in the Far East of her own making, and a rejection of Japanese aspirations which threatened that status quo. In saying,

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26 Pal, Dissentient Judgement, p.499.

> I have so far dealt with those border wars on the assumption that the Japanese forces were rightly in Manchuria, [27]

and then continuing to reject the legality of such a Japanese presence on a technicality, Webb implied another assumption; that the Russian military presence in Mongolia was justified. Webb's legal compromise outlined in the previous chapter was a rationalization whereby he could give legal effect to his basic inclination to see the Japanese as moral aggressors against the Russians. Webb's ethnocentric bias against the Japanese in this phase of the case had its historical origins in the widespread Australian fear much earlier in the century that the Japanese defeat of Russia in the Russo-Japanese war of 1904-1905 would lead to a collapse of white European civilization and that such a collapse would extend to Australia's shore line.[28]

Certainly, as I have previously implied, Webb's anti-Russian bias had the effect of mitigating an anti-Japanese bias, but Webb's feelings against the Japanese were by far the stronger.

Political pressure to find the Japanese guilty served only to buttress Webb's basic inclination to see the Japanese as morally culpable. It was not a dominant factor in itself. Webb knew that the majority were going to produce a finding of 'guilty' on the counts alleging conspiracy and actual aggression by Japan against Russia[29] and so the political

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[27] Webb, 'Final Draft Judgement', p.234.

[28] See above in Chapter I.

[29] This follows from my argument in Chapter III above that Webb was in constant touch with his judicial colleagues including those in the majority during the judgement deliberations.

pressure on Webb to accommodate the Russians was far from overwhelming and likewise the fact that Webb was bound to reach a verdict based only upon the evidence considered by the Tribunal to have relevance does not explain the one-sidedness of his verdict to any great extent. After all, Pal, considering the same evidence, reached the opposite conclusion; not guilty of conspiracy or actual aggression against Russia.[30] According to Pal, 'the border incidents (were) mere border incidents'.[31] Clearly the difference between Pal's verdict and that of Webb rested primarily upon the different fundamental assumptions on aggressive war held by each.

If bias in Webb was the major factor influencing his behaviour at the trial external political pressures also operated, in a less significant way, to stand between Webb and the conduct of a fair trial. Notable amongst these was the Charter itself. The Charter, with its emphasis on speed, and a strict adherence to the charges, served to reinforce a natural tendency towards a practical legalistic approach in Webb. It was in this sense that the Charter, in the effect that it had on the Chief Presider in Tokyo, contained in part the seeds of a political trial. If that was what the framers of the trial had wanted - a speedy, practical 'show piece',[32] then Webb was the right man for the job. But he was the wrong man to conduct a trial which was able to cope

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[30] Pal found the accused innocent on all counts. Minear, Victors' Justice, p.32.

[31] Minear, Victors' Justice, p.138.

[32] Bergamini implies that the trial took on the character of a staged performance. Bergamini, Japan's Imperial Conspiracy, p.176.

with the central issue of aggressive war.

In part then Webb's perceptual failure stemmed also from a methodological failure in his approach to the issue of aggressive war. Webb failed to understand that a narrow legalistic approach was unlikely to produce a just solution to a problem which was as much philosophical and political of its nature, as it was legal. Webb had missed a vital point; that 'rule of law' could not apply where the law itself was defective. Inevitably Webb was thrown back on his own subjective assessment of the morality of the situation. But not without resistance on his part. Webb persisted in reaching for a legal answer to a problem which was essentially beyond the law. The result was that Webb's view of the law and his perception of the reality of the nature of the Japanese involvement in the war, confused and uncertain though that was, tended to diverge. Inevitably, then, Webb's arguments had taken on a quality of rationalization, a rationalization which operated at a subconscious level to bring his legal reasoning in line with his basic belief that the Japanese were aggressors in the moral sense in the Pacific conflict.

The crucial feature then in Webb's role at the trial was that because he was unable to articulate for himself the meaning of 'aggression' and 'self defence' in the Pacific conflict, Webb's decision making inevitably rested upon his ethnocentric bias. Webb's bias operated despite the surface intention to conduct a fair trial, to guide the proceedings along a path that was unfair to the Japanese. The bias varied in intensity as the trial progressed. At times it broke to the surface in Webb's behaviour in court. Minear

cites one extreme example of this.[33] But the fact that for the most part the bias was not obvious in Webb's behaviour was a testimony to his attempt to be objective and fair throughout the proceedings.

Nowhere was Webb's judicial conscience more evident than in the humanitarianism of his sentencing policy. Webb was aware that the trial rested upon shaky legal and moral foundations and it was his intention that his reservations on that score be reflected in the Tribunal's sentencing policy. And so Webb argued, unsuccessfully, against the imposition of any death penalties except for defendants convicted of 'grave war crimes or crimes against humanity'.[34]

As the Chief Presider of the Tokyo Trial which, together with Nuremburg, was in Webb's words 'the greatest in all history',[35] Webb had the opportunity to establish himself as a truly great figure, as a man of stature that history would not forget. Webb failed to fulfil this opportunity. It was more than a failure in a purely careerist sense though that too was important. More important was Webb's failure to take a clear and positive step towards the creation of a new world order rid of the baseness and brutality of international conflict. Webb's ideals, ideals inspired by his deeply felt religious faith, were tainted by the trial, tainted by the cynical intrusion of politics into the process of justice, but, more important than this, by the sheer impracticability

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[33] Minear, Victors' Justice, p.85.

[34] See above in Chapter IV.

[35] Webb, 'Memorandum; by the President, International Military Tribunal for the Far East', August 2, 1946, 'Webb Collection' (A.W.M.) 'President to all Judges, Miscellaneous 1946-1948'.

of ensuring, through international law, peace on earth and goodwill amongst men, The idealism reflected in Webb's motto 'Let justice be done though the Heavens fall',[36] does not square with his introduction to Bergamini's book. Indeed, Webb applied the term 'Machiavellian' to describe his own view that Hirohito was worth saving. Clearly the trial undermined Webb's judicial values. Webb's view on the question of Emperor guilt expressed in his introduction was another volte-face shift in opinion since Webb was adamant at the trial that the Emperor was Japan's number one war criminal who should have been indicted.

This then was the epic nature of the tragedy of Sir William Flood Webb in his role as President of the Tokyo Trial. But Webb's failure was shared in a very real sense by the Australian population at large. The 'Victors' justice' mentality of Australian politicians made an already difficult task for Webb harder still. But ultimately the wider base of this indirect and direct political pressure on Webb was the outlook of the Australian population at large. They shared Webb's ethnocentric bias against the Japanese, a bias greatly intensified by the experience of the war. Webb was the 'man in the middle' caught between the contrary demands of justice and vengeance. That Webb's role in the trial tipped the scales of justice in favour of vengeance was more an indication of the strength of a shared bias than it was a moral failing in Webb himself. In this sense, then, because Webb, as Australian representative on the bench, was the predominant influence in those proceedings, an Australian ethnocentrism

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[36] See above in Chapter II.

which had its roots deep in Australian history, gave rise to the primary fundamental emotional, ideological base of 'Victors' Justice' in Tokyo.

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Considerable mystery surrounds the nature and location of this source which may be confusing to any students wishing to examine this source. The situation regarding this report was explained to me by Mr. Winston Maike of the Queensland Branch of the Australian Archives, and it may

be useful to quote his correspondence (5/9/75) to me in part by way of annotation. Mr. Maike stated,

> ...I understand the 'Webb Report' you refer to was tabled in extract form in the House (Australian Commonwealth Parliament) and published in part at that time and was published again in part this year in several newspapers. This report was the outcome of a then Secret Commission of Enquiry into 'Japanese Atrocities and Breaches of the Rules of War'. In Queensland we hold the first and second (last?) draft of the report as well as some of Webb's background papers, notes and some administrative records of Enquiry. Some sections of the report as well as all exhibits references in the report have not yet come to light in Queensland. I would assume the final and most complete copy of the report is that tabled in the House and held in the Bills and Papers Office of the Parliament. It is common knowledge, however, that there is a copy of a 'Webb Report' in Canberra in the Australian War Memorial which has at least some photographic exhibits attached and which has for some time been closed to public access. The release of the Queensland version of the report by this regional office prompted Australian Archives Central Office to review the access status of the copy in the War Memorial...I think he (Webb) was involved in at least one more enquiry before his involvement in the Tokyo war crimes trials proper....'

Mr. Maike, towards the end of his correspondence, qualified his statements, saying that he was working 'very much on assumption regarding the Canberra copies of Webb's report'.

Mr. David Sissons, of the Department of International Relations, in the A.N.U., Canberra, verified the existence of a full 'Webb Report' in the Bills and Papers Office of the National Parliament in Canberra. He said that that report could be viewed by obtaining special permission.

The report cited by me in this thesis, was opened for public access last year in an expurgated form and it seems reasonable to assume that this was the 'Webb Report' held in the War Memorial that Mr. Maike refers to. There were no photographic exhibits attached. The Australian War Memorial does not list any 'Webb Report' as belonging in the 'Webb Collection'.

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(d) Other

Mrs. Mary Mason and Mr. S.J. Routh provided valuable information by correspondence.

Likewise Mr. David Sissons, provided me with the information on the 'Webb - Evatt' rumour cited in the text.
