
The Curious Case of Singapore's BIA Desertion Trials: War Crimes, Projects of Empire and the Rule of Law

Cheah W.L.*

Abstract

This article critically analyses a set of war crimes trials, conducted by the British colonial authorities in post-World War II Singapore, which dealt, among others, with the contentious issue of deserting British Indian Army soldiers. While seemingly obscure, these trials illuminate important lessons about rule of law dynamics in war crimes trials. Although these trials were intended by their organizers to facilitate the return of British colonial rule, they resulted in unexpected acquittals and conviction non-confirmations. On the one hand, by applying British military law as a back-up source of law when prosecuting 'violations of the laws and usages of war', the British contravened the rule of law by retrospectively subjecting the Japanese defence to unfamiliar legal standards. On the other hand, by binding themselves to a pre-existing and relatively clear source of law, the British were constrained by the rule of law even as this empowered the Japanese defence. These findings speak to broader debates on the challenges of developing international criminal law, by provocatively suggesting that, from a rule of law perspective, what is most important in a body of law is its clarity, accessibility and comprehensiveness rather than its source or its purported 'universality'.

1 Introduction

This article studies a set of lesser-known war crime trials – referred to here as the British Indian Army (BIA) desertion trials – that dealt with, among others, the

* Assistant Professor, Faculty of Law, National University of Singapore, Singapore. Email: lawcwl@nus.edu.sg. Many thanks to faculty and participants of the fifth Annual Junior Faculty Forum, Antony Anghie, Damian Chalmers, Tan Hsien-Li, Swati Jhaveri, Cheah Choo Kheng and Andrew Simester for comments.

contentious issue of deserting BIA soldiers. These trials were conducted by the British colonial authorities in post-World War II Singapore. From 1946 to 1948, while taking part in the Tokyo Trial and other Allied trials, the British conducted a series of war crimes prosecutions against Japanese soldiers for their ill treatment of Indian soldiers, who the defence alleged had deserted the BIA during World War II. These trials had high political stakes and sent shockwaves across the British Empire. Although the British intended these trials to facilitate the return of British colonial rule, strategic moves by the Japanese defence and errors by the British trial participants gave rise to surprising results. While many of the accused were convicted, many were also acquitted or had their convictions not confirmed at the post-trial stage.

These trials, while seemingly obscure, illuminate important lessons about rule of law dynamics in war crimes trials. The rule of law – defined for the purposes of this article as the equal commitment of all to prospective, known and clear rules – played out in these trials in highly interesting ways.¹ On the one hand, by predominantly applying British military law and common law procedure when prosecuting ‘violations of the laws and usages of war’, the British contravened the rule of law by retrospectively subjecting the Japanese defence to unexpected and unfamiliar foreign standards. On the other hand, by committing themselves to pre-existing and relatively clear British courts martial law and procedure, instead of solely relying on the then undeveloped state of international law, the British found themselves constrained by the rule of law even as the Japanese defence was unexpectedly empowered. In rule of law terms, these BIA desertion trials, which resulted in several acquittals and post-trial non-confirmations, seem very different from the Tokyo Trial, where every single accused was convicted and where the convictions were unequivocally confirmed.² Additionally, while the BIA desertion trials’ acquittals and non-confirmations were grounded in existing legal rules, the Tokyo Trial’s convictions have been criticized for being based on retrospectively created, and overly expansive, legal concepts.³

This article’s findings speak to broader debates among international criminal law scholars about the uncertainty and challenges of developing a universally valid and legitimate international criminal law. Some scholars focus on the law’s retrospective development by internationalized criminal tribunals.⁴ Others focus on the claims of different legal traditions over international criminal law’s development.⁵ Such

¹ This article employs the rule of law’s ‘thin’ definition, which requires that ‘law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain and be applied to everyone according to its terms’. Tamanaha, ‘A Concise Guide to the Rule of Law’, in N. Walker and P. Gianluigi (eds), *Relocating the Rule of Law* (2009) 3, at 3.

² The Tokyo Trial resulted in seven death sentences, 16 life imprisonment sentences, one 20-year imprisonment sentence and one seven-year imprisonment sentence. N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), at 252.

³ *Ibid.*, at 220.

⁴ Luban explains that such retrospective development undermines the ‘action-guiding character of law’ and ‘the need to curb abuses of state power’. However, he argues that these ‘legality-based objections to the ICL enterprise are not fatal’. Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law’, in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 569, at 581, 583.

⁵ Ambos argues that ‘increasing experience and practice’ will lead to ‘a harmonic convergence of both systems’ – namely, civil and common law traditions – but that ‘a much greater problem’ may be to

discussions about the development of international criminal law are in part motivated by the belief that international criminal law's legitimacy hinges on its 'manifested fairness'.⁶ This article intervenes in these ongoing deliberations by exploring how a system of predominantly British laws, which at first sight appears clearly biased and unfair to the Japanese defence, nevertheless facilitated acquittals and non-confirmations in the BIA desertion trials. It provocatively suggests that, from a rule of law and defence perspective, what is most important in a body of law is its clarity, accessibility and comprehensiveness rather than its source or even its purported 'universality'. Constructing such a rich and stable body of law takes time. Despite the many other deficiencies of these BIA desertion trials, access to a clear and established system of law not only empowered the defence but also resisted political pressures. The British sought to use these trials to advance certain colonial narratives. Nevertheless, by committing themselves in the name of the 'rule of law' to a process that drew on pre-existing British courts martial law, the British also committed themselves to a system that operated with relative autonomy.

The first part of this article situates the BIA desertion trials against other Allied war crimes trials and the British Empire's post-war landscape, highlighting these trials' political significance to the British colonial authorities returning to Asia. The article then examines the British authorities' use of rule of law and fair trial rhetoric in these trials to reassert British colonial legitimacy. It shows how these trials' actual implementation undermined their rule of law and fair trial claims by retrospectively subjecting the defence to foreign laws. Yet, as demonstrated in the third part of this article, the BIA desertion trials evolved in unforeseen ways. Although the British expected to easily secure convictions, and though the Japanese defence experienced many challenges, the Japanese defence counsel's efforts and the British participants' errors led to some acquittals and post-trial non-confirmations. The fourth part of this article argues that these legally based acquittals and non-confirmations were not an absolute given. Rather, they were shaped by the British trial participants' attitudes towards lower-ranking or ordinary Japanese soldiers as well as the legal framework of the trials, which drew on British court martial law and procedure. This article concludes with some observations about how the BIA desertion trials further our understanding about the rule of law's enabling and constraining power in politically charged war crimes trials.

2 Reasserting Empire through Law: Contextualizing the BIA Desertion Trials and Their Political Significance

After World War II, the Allied powers individually and jointly conducted war crimes trials throughout Asia and Europe.⁷ Apart from taking part with the other Allies

accommodate 'legal systems not based on western traditions'. Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?', 3 *International Criminal Law Review* (2003) 1, at 37.

⁶ Luban, *supra* note 4, at 579.

⁷ For country-based studies, see B. Kushner, *Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice* (2015); S. Linton (ed.), *Hong Kong's War Crimes Trials* (2013); G. Fitzpatrick, T. McCormack and

in the Tokyo Trial, the British organized 131 trials in Singapore that served as their war crimes base in Asia ('Singapore Trials').⁸ Among these Singapore Trials were the BIA desertion trials, a set of trials that were of great political significance but that have been seemingly forgotten.⁹ These trials dealt with war crimes committed by the Japanese accused against Indian soldiers who had allegedly deserted from the BIA. The Indian soldiers' change of allegiance and their prisoner of war (POW) status were highly contested in these trials. Given post-war challenges to British rule in India, Singapore and other British colonies, the British were eager for these trials to showcase BIA soldiers as loyal subjects of the British Empire and victims of the Japanese. In contrast, the Japanese defence sought to portray these Indians as deserters who had switched sides to fight the British alongside the Japanese military.

This section sets the BIA desertion trials in their political and social context, with the aim of explaining how the British employed the rule of law and these war crimes trials to defend the legitimacy of British colonial rule. As was done by the Allies in the Tokyo Trial, the British used rule of law rhetoric in the BIA desertion trials to promote certain political objectives. These British trials, however, differed from the Tokyo Trial by employing British laws apart from international law, as opposed to the Tokyo Trial's sole reliance on international law. As a result, and as explained below, the accused in the BIA desertion trials found themselves explicitly subject to foreign substantive laws and a foreign legal process.

A Contextualizing the BIA Desertion Trials

The British military's ignominious wartime defeat by the Japanese led to the British encountering serious legitimacy issues in Singapore and the region at the end of

N. Morris (eds), *Australia's War Crimes Trials 1945–51* (2016). For a study of Allied prosecutorial policy on Japanese war criminals, see S. Wilson et al., *Japanese War Criminals: The Politics of Justice after the Second World War* (2017).

⁸ The full and original trial transcripts and trial-related records are held at the National Archives of the United Kingdom (TNA). I use the pagination system entered by the TNA staff as reference, placing 'SP' before the number. Names here appear as they are represented in the British records. Note that one of the 131 trials (WO 235/855) is listed by the TNA as 'missing at transfer'.

⁹ This article focuses on the Singapore Trials where issues of British Indian Army (BIA) desertions were discussed. The full citation of these trials in the TNA, as of 7 September 2017, are as follows: WO 235/813 – Defendant: Gozawa Sadaichi; Defendant: Kasiyuki [Kaniyuki] Nakamura; Defendant: Okusawa (or Okuzawa) Ken; Defendant: Kajino Pyuichi [Ryuichi]; Defendant: Tanno Shozo; Defendant: Ono Tadasu; Defendant: Yabi Jinichiro; Defendant: Osaki Makoto; Defendant: Ashiya Tamotsu; Defendant: Chiba Nasami [Masami] – Place of Trial: Singapore (*Gozawa Sadaichi*); WO 235/820 – Defendant Ckamura [Okamura] Hideo – Place of Trial: Singapore (*Okamura Hideo*); WO 235/992 – Defendant: Umeda Katsumi; Defendant: Iwase Katsuji; Defendant: Katayose Nagaki – Place of Trial: Singapore (*Umeda Katsumi*); WO 235/979 – Defendant: Ikegami Tomoyuki; Defendant: Takahashi Ycichi [Yoichi]; Defendant: Takahashi Tatsuo; Defendant: Miyoshi Ren; Defendant: Hisano Jun; Defendant: Takahashi Takeshi – Place of Trial: Singapore (*Ikegami Tomoyuki*); WO 235/960 – Defendant: Takahashi Kohei; Defendant: Kase Tatsuo – Place of Trial: Singapore (*Takahashi Kohei*); WO 235/974 – Defendant: Takashima Shoiaro [Shotaro]; Defendant: Asako Koichi – Place of Trial: Singapore (*Takashima Shotaro*); WO 235/950 – Defendant: Kondo Takeyoshi – Place of Trial: Singapore (*Kondo Takeyoshi*); WO 235/1035 – Defendant: Suwabe Masato; Defendant: Shomotsuura Hiroshi; Defendant: Numata Kimio; Defendant: Nakagawa Koichi; Defendant: Moto Tomizo; Defendant: Ogura Seijiro – Place of Trial: Singapore.

World War II.¹⁰ In addition, the war had thrown up shifting allegiances as numerous individuals and groups in the British colonies threw in their lot with Japan during the war. The Japanese military had exploited such anti-colonial sentiment by encouraging and supporting pro-independence and nationalist groups.¹¹ Among these groups was the Indian National Army (INA), which largely comprised Indian soldiers who had deserted the BIA to fight the British for India's independence from British colonial rule.¹² Throughout the war, the British constantly worried about the INA's impact on the continued loyalty of Indian BIA soldiers who shouldered much of the British war effort. British military authorities ordered a blackout of INA-related information and refused to refer to the INA by its name.¹³

The BIA desertion trials were intended to establish a different narrative of Britain's relationship with its Indian colonial subjects. These trials were to tell the story of Japanese soldiers ill-treating Indian POWs in their custody, with the Indian soldier depicted as a victim rather than as a defiant rebel. Most interestingly, the BIA desertion trials in Singapore were to speak to a very different set of trials conducted by the British across the ocean in India. In November 1945, the British started trying INA leaders for treason at India's Red Fort. The accused were charged with waging war as well as murder and abetment of murder.¹⁴ The defence team and India's Congress politicians rapidly mobilized the Indian public's support behind the accused. Violent protests and riots ensued. The convictions and death sentences handed down in these INA trials were subsequently reduced to cashiering by the confirming officer, undoubtedly to prevent further escalation of dissent and disorder against the British in India.¹⁵

The INA treason trials, and the backlash that followed, undoubtedly contributed to the demise of the British Raj in India. These trials also had ramifications beyond India. Indian migrant communities residing in Singapore maintained close links with India and closely followed India's political developments. It was in Singapore that Subhas Chandra Bose gave new life to the INA and declared the creation of the Provisional Government of Free India or Azad Hind at the Cathay Cinema building.¹⁶ Most of the 232,563 Indians in Southeast Asia who pledged allegiance to Bose's Azad Hind were from Malaya and Singapore.¹⁷ Even after the British returned to Singapore on 5 September 1945, local support for the INA in post-war Singapore remained strong, and Singapore's Indian community continued organizing INA commemoration activities.¹⁸ The British authorities tolerated these INA-related activities in Singapore with

¹⁰ C. Bayly and T. Harper, *Forgotten Armies: Britain's Asian Empire and War with Japan* (2005), at 463.

¹¹ D.P. Chandler, R. Cribb and L. Narangoa (eds), *End of Empire: 100 Days in 1945 That Changed Asia and the World* (2016), at 14–32.

¹² The classic text on the Indian National Army (INA) remains J. Chapman Lebra, *The Indian National Army and Japan* (2008). See also P. Ward Fay, *The Forgotten Army: India's Armed Struggle for Independence 1942–1945* (1994).

¹³ Fay, *supra* note 12, at 422–423.

¹⁴ Green, 'The Indian National Army Trials', 11 *Modern Law Review* (1948) 47, at 52–53.

¹⁵ *Ibid.*, at 59.

¹⁶ Lebra, *supra* note 12, at 128.

¹⁷ K. Blackburn and K. Hack, *War Memory and the Making of Modern Malaysia and Singapore* (2012), at 184.

¹⁸ *Ibid.*, at 186.

their anti-British overtones, but they were also determined to reassert British colonial rule in Singapore.

Against this turbulent political backdrop, and three months after the British organized the first of their post-war INA treason trials in India, the British organized their first BIA desertion trial, which was also the first British war crimes trial to be held in Asia. The trial of *Gozawa Sadaichi* began in Singapore's former Supreme Court on 21 January 1946 and was one of many British war crimes trials that would deal with Japanese war crimes committed against Indian soldiers who, the defence alleged, had deserted the BIA. *Gozawa Sadaichi* started even before the Tokyo Trial, which began on 3 May 1946.¹⁹ Stuart Colin Sleeman, who served as the defence counsel in *Gozawa Sadaichi*, noted that the first British war crimes trial attracted 'the most widespread interest throughout Asia' but that there was 'a certain amount of disappointment' when the first trial focused on crimes committed against Indian soldiers in Palau rather than on crimes committed against residents of Singapore.²⁰ Sleeman then refers to the INA treason trials taking place in India and explained that *Gozawa Sadaichi* 'was an excellent moment to launch upon the world a trial in which Indians were the victims, and to demonstrate once more the absolute equality before the law of the rights of all Imperial subjects, irrespective of nationality, race or colour'.²¹ These BIA desertion trials were thus of significant political importance to the returning British colonial powers.

B Assessing Rule of Law and Fair Trial Claims: The 1945 Royal Warrant Framework Governing the BIA Desertion Trials

British leaders justified their organization of war crimes trials using a mixture of rule of law and fair trial arguments designed to depict the British in a superior light, particularly in comparison to the Japanese. In organizing these trials, Louis Mountbatten, the Supreme Allied Commander of South East Asia Command, was determined that the British military should not be involved in trials of 'a purely political nature'.²² These trials were not to be the vehicles of political vendetta. The former British Lord Chancellor, John Allsebrook Simon, explained that by pursuing war crimes trials instead of summary punishment or complete impunity, the Allies had chosen 'the only course which could hope to impress the world as a vindication of law'.²³ These trial records would demonstrate 'how genuine and intense was the effort made to establish international law on a firmer throne'.²⁴ The accused would be treated fairly in 'an enquiry conducted calmly and dispassionately before a tribunal skilled in sifting evidence' and 'given every opportunity of explanation and challenge'.²⁵

¹⁹ *Gozawa Sadaichi*, *supra* note 9. Y. Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (2008), at 7.

²⁰ C. Sleeman (ed.), *The Gozawa Trial* (1948), at xli–xlii.

²¹ *Ibid.*, at xlii. This representation is of course deeply ironic as the British Empire was based on racial difference between the ruler and the ruled.

²² Sleeman, *supra* note 20, at xiii.

²³ C. Sleeman and S. Silkin (eds), *Trial of Sumida Haruzo and Twenty Others* (1951), at xiv.

²⁴ *Ibid.*, at xiii.

²⁵ *Ibid.*

These rule of law and fair trial themes were stressed by the British trial participants involved in the BIA desertion trials. In *Gozawa Sadaichi*, the prosecution emphasized how the accused were given the 'full opportunity' to make their defence.²⁶ When the Court in *Gozawa Sadaichi* found that the prosecution had failed to prove a *prima facie* case against one of the accused, Kajino Riuchi, it announced that Kajino was 'fortunate in having been tried by the Court of a civilised country which acts on the principle that a man is presumed to be innocent until he is found guilty'.²⁷ Interestingly, the defence counsel in other trials employed similar language in differentiating the British from the Japanese to argue for more lenient treatment of the accused. In *Okumura Hideo*, the British defence counsel argued for sentence mitigation consistent with how the British 'flatter ourselves that our outlook is more liberal, more humanitarian, and more truly in accordance with the facts of modern war'.²⁸ Similar references to the civilized and superior nature of British justice were made in other Singapore Trials.

In reality, the implementation of these trials fell far short of their rule of law and fair trial claims. These trials, like all war crimes trials conducted by the British in Asia and Europe at the end of the war, were organized pursuant to the Royal Warrant of 18 June 1945 (Royal Warrant) and its attached regulations adopted by the British executive.²⁹ The Royal Warrant was supplemented in Asia by Allied Land Forces South-East Asia (ALFSEA) Instruction no. 1, which dealt more with court structure and administrative matters than with law.³⁰ Each court was to comprise a minimum of three judges who were usually from the British military, though the warrant also permitted the appointment of judges from an Allied force.³¹ The courts had the power to pass death sentences, imprisonments, confiscations and fines.³² Acquittals were considered final, but convictions had to be confirmed in post-trial proceedings by a confirming officer before becoming final.³³ The confirming officer could choose not to confirm, or to vary, the court findings.

With respect to the law to be applied, these 1945 Royal Warrant courts were authorized to try violations of the 'laws and usages of war'.³⁴ As the 1945 Royal Warrant also required these courts to be treated as a British field general court martial, unless expressly or implicitly required otherwise, these courts were therefore authorized to apply a mixture of substantive British military law, English common law and international law.³⁵ As explained in greater detail below, due to the relatively undeveloped

²⁶ 'Opening Address of Lieut. Col. R.S. Lazarus (R.A.S.C.)', in *Gozawa Saidachi*, *supra* note 9, SP 00039.

²⁷ *Gozawa Saidachi*, *supra* note 9, SP 00140.

²⁸ *Okamura Hideo*, *supra* note 9, SP 00055.

²⁹ Great Britain War Office, Regulations for the Trial of War Criminals, attached to 1945 Royal Warrant 0160/2498 (1945 Royal Warrant and 1945 Royal Warrant Regulations), 18 June 1945, promulgated by the War Office, Army Order 81, 1945.

³⁰ Allied Land Forces South-East Asia (ALFSEA), *War Crimes Instruction no. 1 (ALFSEA Instruction no. 1)* (2nd edn, 4 May 1946), with amendments, WO 203/6092 and WO 203/6087, TNA.

³¹ 1945 Royal Warrant Regulations, *supra* note 29, Regulation 5.

³² *Ibid.*, Regulation 9.

³³ *Ibid.*, Regulations 8(f)(iv), 11.

³⁴ 1945 Royal Warrant, *supra* note 29, para 1.

³⁵ 1945 Royal Warrant Regulations, *supra* note 29, Regulation 3.

state of international law and since most of the key trial actors were British military personnel, the trial actors made frequent reference to British legal sources, including English case law. This reliance on British law and legal sources distinguished the 1945 Royal Warrant trials, including the BIA desertion trials, from the Tokyo Trial, which relied solely on international law.³⁶ This was highly problematic from a rule of law and fair trial perspective, as this meant judging the Japanese accused based on laws unexpected and foreign to them.

These 1945 Royal Warrant trials also employed a common law adversarial trial process unfamiliar to the Japanese accused and the Japanese defence counsel who hailed from Japan's civil law tradition. In brief, like most trials based on the adversarial model, the prosecution would first present its case and witnesses. If the prosecution managed to establish a *prima facie* case, the defence would be called upon to present its case and witnesses. After hearing both the prosecution and the defence, the court would then hand down its findings and sentences. Trial proceedings in these 1945 Royal Warrant trials were expedited and less formal, especially when compared to the Tokyo Trial. While the Tokyo Trial lasted two and a half years, most of the BIA desertion trials lasted no more than a few days.³⁷ These 1945 Royal Warrant courts also did not issue detailed judgments, though some gave brief reasons when handing down their findings. Legal grounds were more clearly documented in post-trial proceedings. At the post-trial confirmation stage, the Department of the Judge Advocate General (DJAG) would prepare review reports containing factual summaries and legal arguments for the confirming officer's consideration. Unlike trial proceedings, these post-trial confirmation proceedings were not public, although trial records show that the British military took these post-trial proceedings seriously. The law and procedure employed in these trials resulted in numerous obstacles for the Japanese defence.

C Imposing British Law and Process on the Japanese Defence

By applying British law as a fall-back source of law, these 1945 Royal Warrant British trials assessed the Japanese defendants' conduct according to unexpected and foreign legal standards. The Japanese defence also experienced numerous challenges in navigating the British common law trial process. Most of the accused were represented by Japanese defence counsel who were unfamiliar with British law and procedure.³⁸ These Japanese defence counsel were highly qualified in Japan, but they were undoubtedly less familiar than their British counterparts with British law. This was understandable because Japan's legal system prior to the war was based on the inquisitorial process and on European legal codes.³⁹ The Japanese defence also had to deal with unfavourable post-war political conditions. The first batch of Japanese defence counsel were

³⁶ E.g., when discussing crimes against peace in the Tokyo Trial, a key point of debate was whether international law established individual criminal responsibility for crimes against peace. Boister and Cryer, *supra* note 2, at 115.

³⁷ Totani, *supra* note 19, at 7–8.

³⁸ 1945 Royal Warrant Regulations, *supra* note 29, Regulation 7.

³⁹ Takayanagi, 'A Century of Innovation: The Development of Japanese Law, 1868–1961', in H. Tanaka and M.D.H. Smith (eds), *The Japanese Legal System: Introductory Cases and Materials* (1976) 166.

considered to be Japanese surrendered personnel (JSP) alongside other Japanese military personnel.⁴⁰ As JSPs, the Japanese defence counsel were not able to move around freely and had to reside within certain areas. They were given limited access to the accused and had to be accompanied by appointed British military personnel.⁴¹

The British military was required to provide the Japanese defence counsel with British defence advisory officers who would give advice on trial procedure.⁴² Still, trial records show that British defence advisory officers were not always present at all of the trials featuring Japanese defence counsel. For example, the Japanese defence counsel in the BIA desertion trial of *Takahashi Kohei* was not provided with a British advisory officer.⁴³ Some Japanese defence counsel in the BIA desertion trials also had to be reminded by the court from time to time to comply with common law trial procedural rules. For example, in *Takashima Shotaro*, the court reminded the Japanese defence counsel of the procedure to be followed when introducing an expert witness.⁴⁴ Nevertheless, Japanese defence counsel did not face insurmountable procedural difficulties in these trials. Judges in these BIA trials generally took a flexible approach to procedure. Many of these BIA desertion trials were also not among the earlier Singapore Trials, and, as explained in greater detail below, some of the Japanese defence counsel were repeat players who had participated in earlier trials.

Could the challenges experienced by the defence have been mitigated by the judges in these trials? The judges could independently question witnesses after the prosecution and defence, and most courts in the BIA desertion trials did question the trial witnesses. However, most judges were not legally qualified. The 1945 Royal Warrant seemed to anticipate that a legally qualified judge advocate, or someone 'fit' to act in this capacity, should be appointed for trial proceedings.⁴⁵ It also recognized that, if no such person was appointed, the convening officer should ensure that at least one judge had the required legal qualifications.⁴⁶ Even so, the Royal Warrant provided for the possibility that no legally qualified officer was available, recognizing that the trial could proceed if the convening officer indicated in the convening order that no such officer was 'necessary'.⁴⁷ Two BIA desertion trials featured courts with no legal qualifications. R.C.H. Smith, who was not legally qualified but who had served as presiding judge in two of these BIA desertion trials, acknowledged his discomfort at his lack of legal qualifications and recalled having to seek the help of legally qualified

⁴⁰ 'Japanese Defence Counsel & Interpreters, War Crimes Trials', memorandum by Col. R.B. Lambe, War Crimes Section, Adjutant General's Office, ALFSEA Headquarters, to Malaya Command Headquarters, Singapore District Headquarters, Burma Command Headquarters, BT Siam Headquarters, Land Forces Hong Kong Headquarters and Armed Forces Netherlands East Indies Headquarters, Doc. 50697/AG/WCS, 16 October 1946, WO 203/6987, TNA.

⁴¹ *Ibid.*, 2(b) and (c).

⁴² *ALFSEA Instruction no. 1*, *supra* note 30, Part II, para. 17.

⁴³ *Takahashi Kohei*, *supra* note 9.

⁴⁴ *Takashima Shotaro*, *supra* note 9, SP 00066.

⁴⁵ 1945 Royal Warrant Regulations, *supra* note 29, Regulation 5.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

colleagues.⁴⁸ In addition, at least in the Singapore Trials, the courts did not benefit from having legally trained personnel from the DJAG at trial.

British judges and trial participants also did not appear unduly concerned about the Japanese defence counsel's confidence and ability to present a case for the accused. Records show that some trial organizers were worried about securing an adequate number of sufficiently skilled linguistic interpreters, but there were no sustained concerns raised about the foreign nature of the 1945 Royal Warrant trial model *vis-à-vis* non-British trial participants. After participating in *Gozawa Sadaichi* as defence counsel, Sleeman argued that the British would have difficulties trying Japanese defendants because 'so widely does the Oriental outlook on criminal responsibility differ from the European'.⁴⁹ Instead of attributing trial difficulties to the imposition of foreign law and process on the defence, Sleeman relied instead on then-prevailing race-based assumptions.⁵⁰ When asked if he had any 'qualms' about whether the Japanese lawyers understood British military law or trial proceedings, Smith, who had been a judge in these BIA desertion trials, replied that he 'never questioned them about that'.⁵¹ Smith noted that he always queried the defence about whether they had sufficient time to prepare their case before beginning his trials and that '[t]he Japanese never complained about being hurried'.⁵² Still, trial records show that at least some Japanese lawyers found it challenging to follow applicable trial procedure and were not as familiar with the substantive legal rules.

3 Unexpected Trial Developments: Navigating and Contesting the Laws of Empire

The Japanese defence were clearly disadvantaged *vis-à-vis* their British trial counterparts in these trials. Nevertheless, a close analysis of the BIA desertion trial records shows that some of the Japanese defence counsel put forward persuasive arguments. Some doggedly raised arguments based on the victims' alleged change of allegiance and their legal status. Others pursued evidential and factual arguments. Such efforts of the defence eventually led to some acquittals and non-confirmations. These findings go against the observations made of other British war crimes trials, which have been generally critical of the Japanese defence.⁵³ Murray Ormsby, who served as judge

⁴⁸ H.E.R. Smith, Imperial War Museums Interview (Smith Interview), Sound Catalogue no. 12676, Imperial War Museum, United Kingdom, Tapes 15–16.

⁴⁹ Sleeman, *supra* note 20, at xvi.

⁵⁰ These race-based assumptions shaped trial argumentation. See Cheah, 'Culture and Understanding in the Singapore War Crimes Trials (1946–1948): Interpreting Arguments of the Defence', *International Journal of Law in Context* (forthcoming), available at www.cambridge.org/core/journals/international-journal-of-law-in-context/article/culture-and-understanding-in-the-singapore-war-crimes-trials-1946-1948-interpreting-arguments-of-the-defence/18D2A42B0B7664B23776093D5C186711.

⁵¹ Smith Interview, *supra* note 48, Tapes 19–20.

⁵² *Ibid.*

⁵³ See, e.g., Zahar's critique of the defence in the Hong Kong trials. He does recognize that the Japanese defence counsel 'seem to have put in a decent effort at defending'. Zahar, 'Trial Procedure at the British Military Courts, Hong Kong, 1946–1948', in Linton, *supra* note 7, 13, at 46.

and defence advisory officer in Hong Kong's British war crimes trials, recalls the Japanese defence counsel being 'too nice'.⁵⁴ A close analysis of the BIA desertion trial transcripts tells a more nuanced and complex story of the trial participants' experience. Some of the Japanese defence counsel, especially those who had participated in earlier trials, displayed sufficient legal mastery of the applicable British law to mount effective arguments. Also, some British investigators, lawyers and judges made serious legal errors that had to be addressed at the trial and post-trial stage.

A *Efforts of the Defence at Trial: Counter-Narratives and Other Strategies*

British leaders expected their war crimes trials program in Asia to yield easy and secure convictions. Mountbatten instructed that only properly substantiated cases be brought to trial and that 'no one should be charged unless there was very strong *prima facie* evidence that he would be convicted, on evidence which could clearly be seen to be irrefutable'.⁵⁵ He even ordered the release of individuals 'against whom the evidence was not sufficiently clear'.⁵⁶ Despite these expectations of easy convictions, the BIA desertion trials resulted in several acquittals and non-confirmations.

As explained earlier, the accused in these BIA desertion trials were charged with the ill-treatment or deaths of POWs. In response, the defence argued that the Indian victims were not POWs but, rather, BIA deserters who had pledged allegiance to the Japanese military. These victims were to be considered part of the Japanese military and subject to Japanese military rules. Specifically, many defendants argued that these victims were given the same treatment as Japanese military personnel. In *Gozawa Sadaichi*, the first war crimes trials held in Singapore, the defence counsel argued that the Indian victims should not be considered POWs as they were known as '*heiho*', auxiliaries of the Japanese military. This issue was not addressed by the court in detail. Even so, this argument was persistently raised by the Japanese defence counsel in subsequent BIA desertion trials.

In *Ikegami Tomoyuki*, Japanese defence counsel Tatsuzaki Ei, successfully raised sufficient concerns over victim status for the court to call for more detailed discussions on the issue from the prosecution and the defence.⁵⁷ It is noteworthy that a month before *Ikegami Tomoyuki*, Japanese defence counsel Tatsuzaki had served as defence counsel in *Umeda Katsumi*, which concerned the same facts that formed the second charge in *Ikegami Tomoyuki*.⁵⁸ In this earlier trial of *Umeda Katsumi*, Tatsuzaki had raised the issue of the victims' status during his questioning of witnesses, but this issue was not picked up by the court or subject to targeted discussion. In the later trial of *Ikegami Tomoyuki*, Tatsuzaki attempted to once again highlight the relevance of victim status. He pointed out in his opening address that the Indian victims were all 'members of

⁵⁴ 'Appendix: Major Murray Ormsby: War Crimes Judge and Prosecutor 1919–2012', in Linton, *supra* note 7, 215, at 235.

⁵⁵ Sleeman, *supra* note 20, at xiii.

⁵⁶ *Ibid.*, at xiv.

⁵⁷ *Ikegami Tomoyuki*, *supra* note 9.

⁵⁸ *Umeda Katsumi*, *supra* note 9, SP 0012.

the Tokushu Romutai' or 'Special Labour Unit' who had 'voluntarily sworn an oath of allegiance to the Japanese'.⁵⁹ On 25 November 1946, when the court questioned the accused Miyoshi Ren on the nature of the unit, the latter explained that he had been 'ordered and instructed' by his superior officer that the 'Special Labour Unit' comprised 'Indians who had sworn loyalty to the Japanese'.⁶⁰ Miyoshi went on to explain that he always saw the Indians 'being treated the same way as the Japanese soldiers'.⁶¹ These Indians had their own commander selected from among their ranks. There were Japanese officers employed in the unit for 'liaison purposes' and to 'lead' and 'instruct' the Indians to avoid any 'misunderstanding' as the Indians 'did not know Japanese customs and manners'.⁶²

The testimony of another accused in *Ikegami Tomoyuki*, Takahashi Tatsuo, raised further doubts on the status of the victims. Takahashi explained that the Special Labour Unit undertook 'part of the guarding of the oil fields'.⁶³ Takahashi also confirmed that the Indian POWs had their own commanding officer and 'a reasonable amount of freedom'.⁶⁴ This led to the court noting that there was 'a certain amount of corroborated evidence' that the victims were not POWs but, rather, 'persons of Indian birth formerly subjects of His Majesty the King' who, 'by oath of greater weight than a parole made to the Japanese authorities', 'renounced their rights as British subjects'.⁶⁵ The Court called on both the prosecution and the defence to make legal arguments addressing this point. When responding to the prosecution's arguments that drew heavily on British law, the Japanese defence counsel politely admitted his unfamiliarity with British law: 'I do not know the British law very well and so I am not quite sure whether the Indians could renounce their allegiance to the Crown and swore allegiance to the Japanese or not. I do not know how it is stipulated under British Law.'⁶⁶ Given the political and legal circumstances, this should not be read solely as an admission of legal inexperience by defence counsel. The Japanese defence counsel may have chosen to adopt a deferential position for strategic reasons. Defence counsel were indeed expected to act in a respectful, rather than combative, manner in pre-war Japan's inquisitorial system.⁶⁷

While the defence's arguments about victim status did not result in acquittals at the trial level, the defence did secure acquittals by raising other issues, such as false identification and insufficient evidence. In *Gozawa Sadaichi*, the Court decided that the prosecution had failed to prove a *prima facie* case against one of the 10 accused persons at the end of its case and acquitted this accused at the end of the prosecution's case.⁶⁸ The

⁵⁹ 'Opening Address by the Defence Counsel', in *Ikegami Tomoyuki*, *supra* note 9, SP 00099.

⁶⁰ Testimony of Miyoshi Ren, in *Ikegami Tomoyuki*, *supra* note 9, SP 00042.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Testimony of Takahashi Tatsuo, in *Ikegami Tomoyuki*, *supra* note 9, SP 00046.

⁶⁴ *Ibid.*

⁶⁵ *Ikegami Tomoyuki*, *supra* note 9, SP 00047.

⁶⁶ *Ibid.*, SP 00051.

⁶⁷ D.T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (2001), at 75.

⁶⁸ *Gozawa Sadaichi*, *supra* note 9, SP 00140.

accused in *Gozawa Sadaichi* were defended by the British defence counsel.⁶⁹ In subsequent BIA desertion trials, Japanese defence counsel managed to secure acquittals by raising evidential or factual arguments. It was probably easier for the Japanese defence counsel to raise factual arguments rather than legal arguments due to their unfamiliarity with British law. In *Takashima Shotaro*, defence counsel Nakamura Takeshi, who had served as the defence counsel in an earlier trial, successfully argued at the close of the prosecution's case that the prosecutor had failed to submit sufficient evidence to demonstrate a *prima facie* case against one of the two accused.⁷⁰ The court agreed with the defence counsel and acquitted the accused.⁷¹

In the trial of *Kondo Takeyoshi*, which began a couple of weeks after *Ikegami Tomoyuki*, the allegiance issue was again raised by the Japanese defence counsel, Hirose Washiro.⁷² In his opening address, the defence counsel argued, among others, that 'there were no Indian P.O.Ws at Komoriyama' but 'only Indian Working Parties who had renounced their oath of allegiance to the British and had, in common with many other thousands of Indians sworn allegiance to the Japanese'.⁷³ The Court nevertheless decided that there was a case to answer as there was 'ample evidence' that the victims were POWs.⁷⁴ At the end of the trial, the Court observed that though the defence counsel had raised the allegiance issue, he had 'not even put in any evidence to it' so 'the Court will make no notice of it'.⁷⁵ Nonetheless, the Court eventually decided to acquit the accused, although unfortunately it did not set out its reasons for the acquittal. Based on arguments made at trial, the Court's acquittal may be due to the many questions raised by the defence about the identification parade organized during the investigations.⁷⁶

It is noteworthy that most of the Japanese defence counsel who effectively problematized the status of victims to bring it to the Court's attention had served as defence counsel in at least one other trial. These repeat defence counsel, like all of the other Japanese defence counsel in these cases, were also assisted by British defence advisory officers.⁷⁷ Tatsuzaki Ei had served as the Japanese defence counsel in *Umeda Katsumi* and in *Ikegami Tomoyuki*. In the second case, Tatsuzaki managed to raise, through his questioning of witnesses, sufficient questions in the eyes of the Court over the victims' status for the Court to seek legal advice from the confirming officer. Another Japanese defence counsel who managed to challenge the prosecution's categorization of Indian victims as POWs by bringing it to the Court's attention was Nakamura in

⁶⁹ *Ibid.*, SP 00038.

⁷⁰ *Takashima Shotaro*, *supra* note 9, SP 00036.

⁷¹ *Ibid.*, SP 00037.

⁷² Also spelled in the transcript as 'Hiroshé' and 'Hiroshi'. *Kondo Takeyoshi*, *supra* note 9, SP 00006.

⁷³ 'Opening Address (Defence)', in *Kondo Takeyoshi*, *supra* note 9, SP 00063. See also Defence Counsel's submission at trial, in *Kondo Takeyoshi*, *supra* note 9, SP 00019.

⁷⁴ *Kondo Takeyoshi*, *supra* note 9, SP 00019.

⁷⁵ *Ibid.*, SP 00047.

⁷⁶ Fifth ground, in 'Opening Address (Defence)', *supra* note 73, SP 00063.

⁷⁷ There was one trial, *Takahashi Kohei*, where the Japanese defence counsel was not assisted by the British defence advisory officer. Counsel raised victim status but did not sufficiently engage the court for the latter to pick it up. *Takahashi Kohei*, *supra* note 9.

Takashima Shotaro. Nakamura had earlier served as the defence counsel in another case.⁷⁸ It could be argued that the Court in *Takashima Shotaro* was especially alert to the issue, having earlier discussed it in *Ikegami Tomoyuki*. Nakamura's efforts in raising and making this legal argument, while navigating a foreign legal process, should still be recognized.

B Difficulties Experienced by the British Trial Actors: Legal Errors and Avoiding Politics

These BIA desertion trials show that some of the British trial actors found it challenging to deal with complex legal questions. For example, in *Ikegami Tomoyuki*, after the Court was alerted through witness testimony to the possibility that the victims may not be POWs, the Court invited the prosecution and defence to make more detailed arguments on the issue, adjourning until the next day.⁷⁹ After hearing the arguments of the prosecution and the defence, the Court convened for 15 minutes.⁸⁰ The Court then decided that it needed to refer the question to the legal advisors of the convening authority rather than dealing with this question itself.⁸¹

A close reading of the arguments highlights the legal confusion among the British trial actors. In *Ikegami Tomoyuki*, the prosecutor referred to a mixture of British law and international law in responding to the Court's request for further arguments on the victims' status. He argued that any divesting of nationality should be governed by the 1914 British Nationality and Status of Aliens Act and existing British case law, according to which a British national can only divest himself of nationality during war in favour of an enemy state when residing in that state.⁸² Furthermore, based on British case law, the prosecutor argued that, as an individual cannot avoid the 'military obligations' that arose before the renouncement of nationality, he also cannot avoid the 'privileges and benefits' of those undertaking such military obligations, including that accorded under international treaties.⁸³ Even if such change of allegiance were not permitted under British law, the main question should have been whether the accused genuinely believed that the victims were POWs or deserters. This would be relevant to the individual criminal responsibility of the accused. Indeed, as explained below, post-trial proceedings focused on the belief of the accused.

In *Takashima Shotaro*, the prosecution responded to the defence counsel's argument that the Indian victims had pledged their allegiance to Japan by, *inter alia*, arguing that such an argument was foreclosed by the 1945 Royal Warrant Regulations that governed the trials. On the trial's fourth day – 29 January 1947 – the defence counsel had submitted that the Indian victims had taken an oath of allegiance to the Japanese

⁷⁸ WO 235/965 – Defendant: Osato Yoshio; Defendant: Ozawa Heiji – Place of Trial: Singapore, SP 0009.

⁷⁹ *Ikegami Tomoyuki*, *supra* note 9, SP 00047.

⁸⁰ *Ibid.*, SP 00051.

⁸¹ *Ibid.*

⁸² Prosecution's submission on oaths of allegiance, in *ibid.*, SP 00049. British Nationality and Status of Aliens Act, 1914, c. 17.

⁸³ *Ikegami Tomoyuki*, *supra* note 9.

military and were no longer POWs at the time of the alleged crime. The war crime was therefore not within the Court's jurisdiction.⁸⁴ The prosecutor claimed that this argument of the defence was 'cut at the root' by Regulation 6 of the 1945 Royal Warrant Regulations.⁸⁵ Regulation 6 stated: 'The accused shall not be entitled to object to the President or any member of the Court or the Judge Advocate or to offer any special plea to the jurisdiction of the Court.'⁸⁶ The prosecutor argued that Regulation 6 provided a 'complete answer' to the claims made by the defence.⁸⁷ If this claim of the prosecutor was accepted, it would have foreclosed any further discussion of the allegiance question. The Court did not address defence counsel's argument at length and sidestepped the issue by referring to an earlier trial. The court president noted that the Court had been 'concerned in a previous trial' with an 'identical submission raised by the Defence', most possibly referring to *Ikegami Tomoyuki*.⁸⁸ He went on to explain that the 'Legal Advisory Officer to the Convening Authority' in that case had advised the Court that it had jurisdiction and that allegiance could not be renounced based on British law.⁸⁹ The Court avoided having to address the allegiance issue and proceeded with the trial.⁹⁰

British trial actors' reluctance to comprehensively discuss the allegiance issue may be due not only to their unfamiliarity with the law but also to the issue's complex facts and highly politicized nature. There are hints that British trial actors of Indian ethnicity may have been personally invested in these trials. In *Takashima Shotaro*, the British prosecutor B.B. Sahay seemed fixated on proving that the Indian victims had not deserted or changed their allegiance, even after the court's decision that the issue was irrelevant. The prosecutor suggested that Naurang Khan, who had earlier been called as the prosecution's witness, be recalled to give evidence on the allegiance issue.⁹¹ He took the opportunity to highlight that under the Indian Army Act, soldiers 'cannot change their oath of allegiance and if they do so, it would be illegal'.⁹² The defence quickly noted that the Court was 'not trying the Subedar' and that the 'Indian Army Act can, in no way, affect this case'.⁹³ The Court finally addressed itself to the prosecution, observing that it did not require evidence from Khan.⁹⁴ There is evidence that there were divisions among the Indian community on the INA and that BIA soldiers who did not join the INA were resentful of those who did.⁹⁵ Courts are not the most suitable avenues to address politically divisive issues, especially when these issues implicate the trial actors themselves.

⁸⁴ *Takashima Shotaro*, *supra* note 9, SP 00054.

⁸⁵ *Ibid.*

⁸⁶ 1945 Royal Warrant Regulations, *supra* note 29, Regulation 6.

⁸⁷ *Takashima Shotaro*, *supra* note 9, SP 00055.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, SP 00067.

⁹² *Ibid.* Indian Army Act, No. 46, 1950.

⁹³ *Takashima Shotaro*, *supra* note 9.

⁹⁴ *Ibid.*

⁹⁵ Blackburn and Hack, *supra* note 17, at 186.

C *Persuading the British: Taking Law Seriously*

The convictions handed down in three later BIA desertion trials were eventually not confirmed at the post-trial stage. This section considers the post-trial review reports and messages emanating from the DJAG in Singapore. The DJAG review reports discussing the allegiance question were issued in the first half of 1947 in the lead up to India's independence from Britain on 15 August 1947. In 1946, a series of mutinies in India resulted in a 'mood of despondency' among British colonial leaders and a recognition that the Indian army 'was wobbling'.⁹⁶ At the same time, the British in Singapore had to deal with increasing anti-British resistance that broke out in labour riots and protests.⁹⁷ Political conditions seemed to favour post-trial conviction confirmations rather than the post-trial non-confirmations that were taking place.

As explained above, apart from the *Gozawa Sadaichi* trial, which took place in 1946, the first part of 1947 witnessed other trials that discussed the status of the Indian victims. These questions about victim status and its legal significance were of sufficient concern for the DJAG to request advice on the issue from the judge advocate general (JAG) of the British Armed Forces in London. In a message dated 10 January 1947, F.G.T. Davis from DJAG Singapore stated that he would be 'grateful' for the 'opinion' of JAG London on *Ikegami Tomoyuki* and another case tried at Jesselton in Malaysia, namely *Kamimura Eiikichi*.⁹⁸ In this message, Davis observed that there was a need to distinguish between those responsible for coercing the victims to join enemy forces and those accused of ill-treating victims. The person accused of ill-treating the Indian victims should not be held culpable for the coercion undertaken by another in getting the Indian victims to change their allegiance. Specifically, the message noted that the accused may have been acting on 'a *bona fide* mistake of fact' and may have truly believed that the victims were 'persons properly subject to Japanese military law'.⁹⁹ In other words, the accused could have benefited from the criminal law defence of mistake of fact, but this argument had not been discussed at these trials.

Pending receipt of advice from the London JAG, the DJAG in Singapore continued to study and review cases where claims of allegiance change had received substantial discussion. In the DJAG review report on *Ikegami Tomoyuki* dated 13 February 1947, the Indian victims were described as 'originally Prisoners of War, but who had sworn allegiance to the Japanese'.¹⁰⁰ The report highlighted the difference between international law and domestic law, which was another legal point that had not been

⁹⁶ L. James, *The Making and Unmaking of British India* (1997), at 598.

⁹⁷ B.K. Cheah, *Red Star over Malaya: Resistance and Social Conflict during and after the Japanese Occupation, 1941–1946* (2nd edn, 2012), at 261.

⁹⁸ 'War Crimes Trial', Brigadier F.G.T. Davis, Department of Judge Advocate General (DJAG), South East Asia Land Forces (SEALF), to Judge Advocate General of the Forces, London, 10 January 1947, in *Ikegami Tomoyuki*, *supra* note 9, SP 00005. WO 235/1000 – Defendant: Kamimura Eiikichi; Defendant: Yamaguchi Katsuyuke – Place of Trial: Jesselton.

⁹⁹ *Ikegami Tomoyuki*, *supra* note 9, SP 00008. The report also found that the question of the victims' status 'is one of fact, though dependent on considerations of law', thus categorizing this as a mistake of fact.

¹⁰⁰ 'War Crimes Trial', review report prepared by Brigadier F.G.T. Davis, Department of Judge Advocate General (DJAG), SEALF, 13 February 1947, in *Ikegami Tomoyuki*, *supra* note 9, SP 00010.

discussed at these trials. It acknowledged that based on the 'domestic law of England', it was not possible for a British subject to renounce his or her nationality while on enemy or enemy-occupied territory during a war.¹⁰¹ Under this domestic law, an individual who did so would have committed an offence under the 'English law of treason'.¹⁰² Regardless, under 'international law', when an individual 'voluntarily' joined enemy forces, disciplinary action against him pursuant to the enemy's military law would not be considered a war crime.¹⁰³ The review report went on to note that 'there was no evidence' that the Indians had been 'suborned' or coerced by the Japanese.¹⁰⁴ Facts about the allegiance change process were therefore important. However, none of the trials had comprehensively discussed the facts surrounding the alleged allegiance change.

In a later message dated 27 February 1947 from Davis to London, Davis explained that he had received additional facts about the Indian POWs' experience during the war:

Information has since been received to the effect that Indian prisoners of war who refused to join the Indian National Army were sent to various theatres as slave labourers and that the ROMU TAI, or Special Labour Corps, were formed of such men.¹⁰⁵

This information showed that any change of allegiance was possibly extracted from the victims under duress, and, based on observations made in the earlier DJAG review report discussed above, such coerced change of allegiance would not have effected any change of POW status. Notwithstanding this, there was still the question of the accused person's own state of mind regarding the victims' status, as raised in the earlier DJAG message dated 10 January 1947.

The next DJAG review report dealing with this issue was that of *Takashima Shotaro* dated 15 April 1947.¹⁰⁶ The DJAG observed that the defence had raised the point at trial that the victims were originally POWs who had taken oaths of allegiance to Japan and had thus lost their POW status.¹⁰⁷ During the trial, the accused were questioned about the army order that confirmed the non-POW status of these Indian victims, but the prosecution's application to recall a witness to give evidence on this point had been 'unfortunately rejected' by the trial court 'as a matter of law'.¹⁰⁸ The DJAG review report went on to explain that the accused could still argue the additional point that he 'honestly believed that he was acting within his rights towards men whom it was his duty to treat as such'.¹⁰⁹ In other words, the DJAG was of the opinion that the

¹⁰¹ *Ibid.*, SP 00013.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ 'Trial of War Criminals', message from Brigadier F.G.T. Davis, DJAG, SEALE to Judge Advocate General of the Forces, London, 27 February 1947, in *Takashima Shotaro*, *supra* note 9, SP 00007.

¹⁰⁶ 'War Crimes Trial', review report prepared by Brigadier F.G.T. Davis, Department of Judge Advocate General (DJAG), SEALE, 15 April 1947, in *Takashima Shotaro*, note 9, SP 00005.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, SP 00006.

accused could raise the defence that he had honestly believed the victims had lost their POW status. This review report went on to advise non-confirmation of the trial court's findings.

4 Rule of Law Tensions in the BIA Desertion Trials

In short, legal arguments about the victims' status generally did not convince the judges at the trial stage. Still, legal discussions at trial raised sufficient concerns for several post-trial DJAG reviews to recommend non-confirmation on legal grounds. A possible explanation for this outcome is that the DJAG staff involved at the post-trial confirmation stage had more legal experience than the trial prosecutors and judges, most of whom did not hold formal British legal qualifications. The Court that decided *Ikegami Tomoyuki* and *Takashima Shotaro* did not have a legally qualified judge.¹¹⁰ Nevertheless, these post-trial decisions could have easily gone another way. Unlike trial proceedings, post-trial confirmation proceedings were not public and were seldom reported in the media. Given the political stakes involved in the BIA desertion trials, post-trial decision makers could have chosen not to disturb trial convictions and ignore pertinent legal rules. What then explains the rule of law compliance of the British decision makers?

A broader contextual analysis suggests several socio-political and legal factors contributing to acquittals and non-confirmations in these BIA desertion trials. It is important to appreciate that these trials were not only part of a larger British war crimes prosecution endeavour but also part of a longer, more established British court martial tradition. British trial participants were all military personnel. This section argues that the military background of the British trial personnel could have resulted in more liberal or sympathetic attitudes towards ordinary Japanese soldiers. In addition, the fact that these trials were based on relatively detailed British courts martial law placed a check on the discretion of the British trial participants, some of whom exhibited a genuine commitment to ensuring legally grounded outcomes. Ironically, while subjecting the Japanese accused to unfamiliar British court martial law undermined the rule of law, the relatively certain and detailed nature of this body of law also enhanced the British decision makers' compliance with the rule of law.

A *British Attitudes towards Ordinary Japanese Soldiers*

One important factor separating the BIA desertion trials and other Singapore Trials from the Tokyo Trial is that the former dealt with largely lower-ranking military personnel. It is worth recalling that during the war when the Allies first started discussing Axis war crimes with specific reference to Nazi crimes, many British government officials, including Prime Minister Winston Churchill, distinguished between

¹¹⁰ This was possibly why the court in *Ikegami Tomoyuki*, referred the issue of allegiance and victim status to the convening authority after hearing the arguments of the prosecution and defence on this. *Ikegami Tomoyuki*, *supra* note 9, SP 00051–00052.

high-ranking and lower-ranking Axis personnel. At the 1943 Moscow Conference, Joseph Stalin had declared his wish for 100,000 German soldiers to be summarily shot at the end of the war. Churchill protested, describing this as a 'cold blooded execution of soldiers who had fought for their country'.¹¹¹ Instead, Churchill advocated for a smaller number of summary executions, comprising 50–100 high-ranking Nazi personnel.¹¹² Up until 1944, British leaders were unable to agree on how to deal with war criminals, settling on a 'middle course' of summarily executing high-ranking Axis personnel and prosecuting lower-ranking Axis personnel.¹¹³ In May 1945, the British government aligned its position to that of the USA and committed itself to the prosecution of suspected war criminals.¹¹⁴

Despite taking a more liberal attitude towards lower-ranking war crimes suspects, the British leaders chose to deny the applicability of a defence most relevant to these suspects – the defence of superior orders. All militaries, including that of the British and its Allies in World War II, required their military personnel to obey orders. Details in the laws and practices regulating such obedience differed from military to military and from country to country. The British military itself changed its position on superior orders during the war. In 1944, the *British Manual of Military Law*, which previously recognized that those acting under superior orders were 'not war criminals', was amended to state that superior orders did not 'deprive the act in question of its character as a war crime' or 'confer upon the perpetrator immunity from punishment'.¹¹⁵ The amended manual did state that a court encountering a plea of superior orders was 'bound' to consider 'the fact that the obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces' and that under 'conditions of war discipline', military personnel could not 'be expected to weigh scrupulously the legal merits of the order received'.¹¹⁶ The 'major principle' was that military personnel were 'bound to obey lawful orders only' and could not avoid liability if their acts contravened 'unchallenged rules of warfare and outrage the general sentiment of humanity'.¹¹⁷

Britain's wartime change of position on the defence of superior orders raises questions of legal retrospectivity. British military courts nevertheless followed Britain's amended official policy on the defence of superior orders in the BIA desertion cases, most of which featured pleas of superior orders. In *Gozawa Sadachi*, the DJAG review report noted that the accused's superior orders plea had no merit as the orders were 'manifestly illegal'.¹¹⁸ Still, a close reading of the BIA desertion cases shows British

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*, at 187.

¹¹⁴ *Ibid.*, at 191.

¹¹⁵ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), ch. 10, at 281–282. *British Manual of Military Law* (1929) (as amended).

¹¹⁶ United Nations War Crimes Commission, *supra* note 115, at 282.

¹¹⁷ *Ibid.*

¹¹⁸ 'War Crimes Courts', review report prepared by Brigadier E.G.T. Davis, 27 February 1946, in *Gozawa Sadachi*, *supra* note 9, SP 00010.

military courts treating superior orders as a possible mitigating factor. Judges in these trials were military personnel and not civilians, unlike the judges in the Tokyo and Nuremberg Trials, and these military judges could have been more sympathetic to military personnel confronted with superior orders. Judges in the BIA desertion cases distinguished between those accused who initiated the crimes at hand and those who had followed or transmitted orders. For example, in *Okamura Hideo*, the accused had referred the victim's theft of sweet potatoes to the Japanese military police or the Kempeitai, which had ordered the accused to execute the victim.¹¹⁹ At the end of the trial, the Court stated that it had not been 'proved' that the accused had 'initiated' the crime of executing the victim.¹²⁰ Taking this and other mitigating factors into account, the Court decided it would be 'lenient' and sentenced the accused to seven years of imprisonment.¹²¹ The courts in these cases considered not only the individual's rank but also the individual's actual role in the crime. In *Gozawa Sadaichi*, the Court sentenced Lieutenant Kaniyuki Nakamura to death and Captain Gozawa Sadaichi to 12 years imprisonment, although the latter outranked the former, as the Court considered the latter the 'tool' of the former.¹²²

This more liberal attitude towards lower-ranking or ordinary Japanese soldiers was similarly captured in the reflections of Smith, who had served as a judge in two of the BIA desertion trials. In a post-war interview, Smith explained that he had a 'great respect' for Japanese soldiers and that he believed they were 'among the best troops'.¹²³ He also admitted that he was 'anti-war crimes trials'.¹²⁴ Smith explained that as the trials progressed, and those 'who were blatantly murderers or anti-social in the military sense' had been punished, he started to wonder why the prosecution of 'small offenders' continued.¹²⁵ When referring to 'small offenders', Smith did not exclude those accused of serious acts. He included in this category of 'small offenders' those who had participated in 'water treatment', a particularly notorious form of torture associated with the Japanese military during World War II.¹²⁶ The trial personnel's prolonged exposure to such acts by lower-ranking accused over many trials may have contributed to this attitude. More tellingly, Smith believed that, if the British had lost the war, British soldiers like himself would have been tried as war criminals.¹²⁷ The fact that only Axis personnel were prosecuted for war crimes after the war possibly reinforced this belief among military personnel. For ordinary soldiers, being prosecuted for war crimes appeared to come down to whether one fought on the winning or losing side of the war.

Not everyone in the British military reacted positively to trials that resulted in acquittals, even when these trials involved lower-ranking accused. For example, criticisms

¹¹⁹ Testimony of Okamura Hideo, in *Okamura Hideo*, *supra* note 9, SP 00042.

¹²⁰ *Okamura Hideo*, *supra* note 9, SP 00057.

¹²¹ *Ibid.*

¹²² 'War Crimes Courts', *supra* note 118, SP 00011.

¹²³ Smith Interview, *supra* note 48, Tapes 3–4.

¹²⁴ *Ibid.*, Tapes 11–12.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, Tapes 9–10.

were made against the acquittals handed down in *Gozawa Sadaichi*.¹²⁸ It is undeniable that the Allied leaders' enthusiasm for war crimes trials diminished over time as the result of Cold War politics.¹²⁹ This article argues that even prior to such diminished enthusiasm, there was a distinct difference in how the British approached trials of lower-ranking or ordinary Japanese soldiers. Although there were varying views among military personnel, there did seem to be a certain level of sympathy among British decision makers for ordinary Japanese soldiers who were merely performing their wartime military duties. This possibly explains why British trial personnel were willing to consider applicable defences or mitigating factors, as was the case in the BIA desertion trials.

B Available Jurisprudence and British Legalism

Another important factor influencing how the rule of law played out in the BIA desertion trials was the type of jurisprudence available to the trial participants. The BIA desertion trials, like other trials conducted by the British under the 1945 Royal Warrant, differed from the Nuremberg and Tokyo Trials because they were ultimately based on British court martial law and procedure. At first sight, the legal framework governing these British trials appeared to be very brief, as the 1945 Royal Warrant regulating these trials contained only 13 regulations. These regulations dealt with court structure and general procedure rather than substantive or procedural law. However, the 1945 Royal Warrant also stated that, unless indicated 'expressly or by implication', the law applicable to a British Field General Courts-Martial also applied to war crimes courts established under the Royal Warrant.¹³⁰ The warrant did expressly carve out numerous exceptions, exempting these trials from certain rules that would otherwise apply to a British Field General Courts-Martial. Apart from these exceptions, laws and procedure applicable to a British Field General Courts-Martial were to apply, including British military rules and English law.¹³¹

The Royal Warrant also required these British military courts to 'take judicial notice of the laws and usages of war'. Trial participants did refer, in fact, to the 1929 Geneva Convention III Relative to the Treatment of Prisoners of War and to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and its accompanying regulations.¹³² These treaties were inadequate for the purposes of establishing individual criminal responsibility because of their limited scope and focus on state responsibility. Trial participants frequently resorted to British military laws and English criminal laws applicable to a British field general court martial. Much reference was also made to the *British Manual of Military Law*, which contained not only

¹²⁸ Sleeman, *supra* note 20, at xlv.

¹²⁹ For an account of the British authorities' evolving trial policies, see Pritchard, 'The Gift of Clemency Following British War Crimes Trials in the Far East, 1946–1948', 7 *Criminal Law Forum* (1996) 15.

¹³⁰ 1945 Royal Warrant Regulations, *supra* note 29, Regulation 3.

¹³¹ Army Act, 1955, c. 18, ss 127–128.

¹³² Geneva Convention III Relative to the Treatment of Prisoners of War 1949, 75 UNTS 135; Hague Convention IV on Respecting the Laws and Customs of War on Land 1907, 187 CTS 227.

the relevant statutes but also concise explanations on substantive and procedural law. Indeed, trial participants often treated the manual as an authoritative source of law rather than as evidence of existing law.¹³³ This is problematic and was probably due to the trial participants' insufficient legal training. Even so, for this article's purposes, it is important to note that the trial participants perceived themselves as being bound by a relatively detailed pre-existing corpus of legal rules. This distinguished the BIA desertion trials from the Nuremberg and Tokyo Trials, which were to apply only international law despite its nascent nature. Indeed, the then inchoate state of international law arguably enabled the Nuremberg and Tokyo Trials' expansive judicial law-making, for which the Tokyo Trial, particularly, has been heavily criticized.

The suggestion here is that having a clear body of law constrained the British decision makers while empowering the Japanese defence in the BIA desertion trials. Japanese defence counsel, despite being unfamiliar with British law and common law procedure, could refer to laws and explanations set out in the 1945 Royal Warrant, Army Instruction no. 1 and the *British Manual of Military Law*. British trial actors also showed a certain level of commitment to getting the law right. As explained above, trial judges in the BIA desertion trials referred legal questions to the convening authorities, while confirming officers addressed legal errors made at trial based on the DJAG review reports. Several DJAG review reports highlighted the applicability of the defence of mistake in the BIA desertion trials, a defence that was explicitly recognized and explained in the *British Manual of Military Law*.¹³⁴ By committing themselves to a comprehensive set of legal rules accessible to all sides, British decision makers found themselves obligated to apply these rules even when this was to their political disadvantage.

Furthermore, since these BIA desertion trials were conducted over a period of time, these trials generated their own embryonic case law. British decision makers made comparisons across trials to ensure consistent treatment of accused, particularly at the post-trial confirmation stage. The DJAG first recognized the relevance of the defence of mistake in two documents, dated 10 January 1947 and 13 February 1947, in the case of *Ikegami Tomoyuki*.¹³⁵ This resulted in a non-confirmation dated 17 February 1947.¹³⁶ The DJAG then recommended non-confirmation in a different case, *Takashima Shotaro*, in a review report dated 15 April 1947 because the issue of whether the accused were acting pursuant to an honest mistake had not been 'before the Court'.¹³⁷ Similarly, in *Umeda Katsumi*, the DJAG review report dated 15 April 1947 took note of the earlier case *Ikegami Tomoyuki*, advising that 'the question should be resolved in favour of the accused' and that the convictions not be confirmed for the

¹³³ Similar observations by Linton regarding the Hong Kong Trials. Linton, 'War Crimes', in Linton, *supra* note 7, 95, at 106.

¹³⁴ *British Manual of Military Law*, *supra* note 115, at 106.

¹³⁵ 'War Crimes Trial', *supra* note 98, SP 00008. 'War Crimes Trial', review report prepared by Brigadier E.G.T. Davis, DJAG, SEALE, 13 February 1947, in *Ikegami Tomoyuki*, *supra* note 9, SP 00013.

¹³⁶ *Ikegami Tomoyuki*, *supra* note 9, SP 00017.

¹³⁷ 'War Crimes Trial', review report prepared by Brigadier E.G.T. Davis, DJAG, SEALE, 15 April 1947, in *Takashima Shotaro*, *supra* note 9, SP 00006.

'same reasons' that non-confirmation had been advised in *Ikegami Tomoyuki*.¹³⁸ Such comparisons across cases were not perfect. In *Takahashi Kohei*, the DJAG review report dated 26 February 1947 advised confirmation, although the DJAG had earlier recommended non-confirmation in *Ikegami Tomoyuki* despite recognizing that the defence counsel in *Takahashi Kohei* had argued that the accused 'believed' the victims to be 'labourers' rather than POWs.¹³⁹ This may be because the DJAG review report found that there was 'no evidence' in *Takahashi Kohei* to support the defendants' arguments about the victims' status as 'labourers'.¹⁴⁰ The defendants in this case also received the relatively lenient sentence of six months for ill treatment of POWs.

In brief, although the 1945 Royal Warrant framework put in place a trial process that disadvantaged the Japanese defence in many ways, it also confined the British to applying an established body of law based on the British court martial system. British decision makers appeared to make efforts to ensure that trial outcomes, if not the process, were substantively just and consistent with the law. This hemmed in the decision-making powers of British trial actors. Cumulative trials also facilitated cross-trial comparisons and the development of an emerging jurisprudence. As mentioned earlier, many of the BIA desertion trial non-confirmations took place in the earlier months of 1947 in the lead up to India's independence. The fact that these post-trial proceedings occurred away from the public's eye could have allowed for a more dispassionate consideration of the allegiance issue. Of course, it could have also gone the other way. With post-trial proceedings taking place outside public scrutiny, these proceedings could have been the perfect set-up for vengeance. Yet the non-public nature of these proceedings, in fact, seems to have provided some leeway for decision makers to make legally based, though unpopular, decisions.

5 Conclusion

The BIA desertion trials are worth revisiting as they offer unique insights into rule of law tensions affecting war crimes trials. This is not to say that these trials were legally unproblematic. Indeed, these trials, while purporting to deliver high quality justice that would cast the returning British colonial authorities in a superior light, did not meet many of their own rule of law and fair trial claims. Nevertheless, the political pressures accompanying these trials, and the diverse participation challenges impacting the defence, could have easily translated into expansive legal findings of guilt and harsh sentences for the accused, as was the case in the Tokyo Trial. Instead, the rule of law's constraining influence led to legally grounded acquittals, non-confirmations and a certain level of substantive justice in these BIA desertion trials.

¹³⁸ 'War Crimes Trial', review report prepared by Brigadier F.G.T. Davis, DJAG, SEALE, 15 April 1947), in *Umeda Katsumi*, *supra* note 9, SP 00005.

¹³⁹ 'War Crimes Trial', review report prepared by Brigadier F.G.T. Davis, DJAG, SEALE, 26 February 1947, in *Takahashi Kohei*, *supra* note 9, SP 00004.

¹⁴⁰ *Ibid.*

Like all of the 1945 Royal Warrant trials, these BIA desertion trials were to target ‘violations of the laws and usages of war. In doing so, these trials applied not only international law but also pre-existing British court martial law as a back-up source of law. This imposition of British law was highly unfair to the accused. Apart from assessing the accused based on foreign standards, the Japanese defence counsel experienced trial participation challenges as they were unfamiliar with British court martial law. However, this body of law was also relatively clear, stable and accessible. This enabled some Japanese defence counsel, especially repeat players, to deploy persuasive legal arguments. British decision makers also found themselves bound by concrete legal positions, which they complied with even when these gave rise to politically disadvantageous results. This outcome, I argue, was facilitated in part by the more liberal attitudes of British decision makers towards the lower-ranking Japanese accused.

Thus, these BIA desertion trials differ from the Tokyo Trial, which applied only international law, despite its ambiguous state, and engaged in expansive judicial law-making – a criticism that has also been levelled against contemporary internationalized criminal courts.¹⁴¹ Concerns over expansive judicial law-making may decrease with international criminal law’s increased codification. As international criminal law’s codification rapidly takes place, and as its amendments and interpretation generate increasing legal complexity, it is worth recalling the experience of the trial participants in these BIA desertion trials.¹⁴² The legal sources and legal arguments employed in these BIA desertion trials were relatively certain and straightforward. This favoured the inexperienced defence while restraining those in power. As today’s project of constructing international criminal law continues, it is important to remember that, in terms of limiting the discretion of decision makers and ensuring the fair participation of the defence, it may be more important to focus not so much on assessing the law’s source, universality or representativeness but, rather, on constructing laws and procedures that are not only comprehensive but also clear, stable and accessible to all.

To conclude, despite many shortcomings, the BIA desertion trials show that the rule of law remains relevant as a constraint on power in politically charged war crimes trials. By committing themselves to a relatively clear and comprehensive set of laws, the British decision makers backed themselves into a double bind. Despite political pressures to secure convictions, the British trial actors found themselves having to seriously consider legal arguments made by Japanese defence counsel and ensuring that trial results complied with existing rules. The British were thus limited by the rule of law even as they sought to exploit it in the name of the dying British Empire.

¹⁴¹ Anghie and Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflict’, 36 *Studies in Transnational Legal Policy* (2004) 185, at 201.

¹⁴² One recent observation made is that international criminal law’s development ‘could soon go beyond the actual needs of the practice of criminal justice’. See ‘Philosophical Foundations of International Criminal Law: Its Intellectual Roots, Related Limits, and Potential’, *Centre for International Law Research and Policy*, 25–26 August 2017, available at www.cilrap.org/events/170825-26-delhi/.