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# PROBLEMS OF A WARTIME INTERNATIONAL LAWYER

L.C. Green†

Despite the courts-martial that were held in relation to the Korean and Vietnam wars, culminating in the *Calley*<sup>1</sup> processes, perhaps there is still room, particularly as the number of those with practical wartime experience is decreasing, for one who acted as a wartime attorney during the Second World War to describe some of the problems that confronted a military lawyer who knew "some" international law (which transcended issues relating to the law of armed conflict) during that war. It will be understood that in some ways this paper is more personal in style than is usually the case in an academic journal, and that some of the issues relate to municipal, criminal or military, rather than international law.

When I graduated with a first class LL.B. degree from the University of London in 1941 and I was duly conscripted into the British Army, I had no idea that my legal studies and primary qualifications would be of much practical value during my military service. True, public international law had been one of my degree subjects; therefore I knew more than did my fellow recruits.<sup>2</sup> Beyond this, it did not seem that my legal knowledge would be of great significance as a member of the King's Royal Rifle Corps—an infantry unit. The situation seemed no different when I was transferred into the Intelligence Corps to learn how to translate captured Japanese documents. However, it was my knowledge of Japanese that would determine my future as a military lawyer.

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<sup>1</sup> *United States v. Calley*, 46 C.M.R. 1131 (1971), *aff'd*, 48 C.M.R. 19 (1973).

<sup>2</sup> For example, that I was not allowed to ill-treat prisoners of war or civilians and that, if captured, I was only required to give the enemy my name, regimental number and rank.

In the film *Breaker Morant*, which deals with the court-martial of three Australian officers attached to the British forces during the South African (Boer) War and charged with what today would be considered war crimes (namely, unlawful killing of wounded personnel and civilians), a young solicitor with little or no experience of criminal practice, or military law, was detailed to defend them. Two of the accused were executed, while the third was sentenced to a term of years and subsequently wrote his personal account of the trial.<sup>3</sup> This practice of detailing defence officers in courts-martial still existed in the British forces during the Second World War, although today a more permanent team of army lawyers is available. However, during the war, an accused could be defended by a completely unqualified "prisoner's friend."<sup>4</sup>

In contrast to the defence, the prosecution would in many cases be undertaken by a qualified lawyer, unless he was held at the front. At trial, judges would be drawn from among officers of an equal or higher rank than the accused, and it was almost certain that none of them would have had any legal training. These officers would normally be members of the regular forces or would have seen action and they would be assisted by a legally qualified officer, the Judge Advocate. His task was to explain the law, sum up the evidence and act as legal advisor to the tribunal. When necessary, the Judge Advocate would act as legal advisor to the defending officer as well. While he would not participate in the tribunal's deliberations, he would remain available to provide any further legal advice or interpretation that the "judges" might need.<sup>5</sup> At that time, though the matter is now different by virtue of the Courts-Martial (Appeals) Act,<sup>6</sup> there was no appeal to any higher tribunal, although the sentence had to be confirmed by the convening officer (the senior officer who had ordered the trial to be instituted), who would have played no role in the proceedings.

The Indian Army was governed by its own statutes and the

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<sup>3</sup> G. WITTON, *SCAPEGUATS OF THE EMPIRE* (1907).

<sup>4</sup> See HIS MAJESTY'S STATIONERY OFFICE, *MANUAL OF MILITARY LAW* 48 (1929)(hereinafter *MANUAL*).

<sup>5</sup> See Griffith, *Justice and the Army*, 10 MOD. L. REV. 292, 293-98 (1947).

<sup>6</sup> Courts-Martial (Appeals) Act, 1951, 14 & 15 Geo. 6, ch. 46.

tribunals established under the Indian Army Act<sup>7</sup> were obliged to apply the Indian Penal Code<sup>8</sup> and the Indian Rules of Evidence<sup>9</sup> and Criminal Procedure.<sup>10</sup> However, the organization of the Indian Army's courts-martial were virtually the same as those applicable to the British forces. This became relevant when British forces in Burma started capturing members of the Indian National Army (INA). This Army had been raised by the Japanese, through the use of Indian military and civilian propagandists and captured personnel. It was recruited from large numbers of Indian Army prisoners of war captured in Hong Kong, Malaya, Singapore and Burma. The ideology underlying this "Army" and the "Provisional Government of Free India" to which it was subordinated by the Japanese was the independence of India. The personnel involved were led to believe they were an ally of the Japanese who would help them to free India from British rule.<sup>11</sup> In fact, the Japanese did agree to the appointment of a Major-General in the INA, a former Lieutenant-Colonel in the Indian Medical Service, as Governor of the Andaman and Nicobar Islands, which had been "liberated" from the British. Had this officer when taken prisoner continued to serve in a purely medical capacity, rather than in a political role dependent upon his captors, he probably would have done nothing of a criminal character.<sup>12</sup> With the capture of such former mem-

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<sup>7</sup> Indian Army Act, 1911, Official Publication Number V8-66. This resource is available at the India Office-Library and Records, 197 Black Friars Road, London, England, SE1 8NG; telephone number, 81-928-9531.

<sup>8</sup> INDIA PEN. CODE (1860) *reprinted in* K. CHAKRAVARTI, CRIMINAL MAJOR ACTS 476 (1985).

<sup>9</sup> INDIA R. EVID. (1872) *reprinted in* CHAKRAVARTI, *supra* note 8, at 775.

<sup>10</sup> INDIA CODE CRIM. PROC. (1898) *reprinted in* CHAKRAVARTI, *supra* note 8, at 1.

<sup>11</sup> For one discussion concerning the origin of INA aims, see Green, *Indian National Army Trials*, 11 MOD. L. REV. 47 (1949); *see also*, B. DESAI, I.N.A. DEFENCE (1946).

<sup>12</sup> See Convention For the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July, 1929, 47 Stat. 2074, 118 L.N.T.S. 303, *reprinted in* D. SCHINDLER & J. TOMAN, THE LAWS OF ARMED CONFLICTS, 325 (1988). Art. 12(c) states: "Pending their return [medical personnel] shall continue to carry out their duties under the direction of the enemy; they shall *preferably* be engaged in the care of the wounded and sick of the belligerent to which they belong" (emphasis added). *Id.* at 328-29. *See also* Vowinckel v. First Federal Trust Co., 15 F.2d 872 (N.D. Cal. 1926), in which it was held that a German doctor residing in the United States who went to Germany and served as a doctor in the German Red Cross during World War I was not an "enemy . . . in any proper sense of that term," since he was not considered part of the military forces. *Id.* at 874.

bers of the British Indian Army, the military authorities decided to institute courts-martial, charging among other offences, "Waging War Against the King," the name by which treason was described in the Indian Penal Code.<sup>13</sup>

## I.

On one occasion my commanding officer, an expert in translating Japanese, was called upon to translate a portion of a diary which referred to one of the INA accused. Having virtually destroyed the case for the prosecution by stating that no Englishman could really be considered an "expert" in so far as the Japanese language was concerned, he was asked if he knew of any young officer who might be able to defend such personnel in future trials. He replied that he had among his staff a young lieutenant who held a legal degree and who knew all about the Indian National Army from his work as a translator of captured documents. He, of course, did not point out that this officer had gone straight from law school into the Army, had never appeared in court and was a graduate in English law!

Shortly thereafter, I was called upon to defend two Indian non-commissioned officers, a *naik* (corporal) and a *lance-naik* (a lance-corporal), who were charged as members of the Indian National Army with waging war against the King—a capital offence. I stated that although I was perfectly willing to undertake this task, there were a number of problems. In the first place, I explained that I did not speak Urdu, the language of the Indian Army, or for that matter any other Indian dialect. Since neither of the accused spoke English, I would have to depend upon the services of an interpreter. I was assured that a competent translator would be available. Next, I pointed out that I had taken *English* criminal law in my examinations, based on Kenny's *Outlines*,<sup>14</sup> supplemented by Harris,<sup>15</sup> and that I had never even looked at the Indian Penal Code, let alone the Indian Code of Criminal Procedure. Moreover, I had not even studied procedure

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<sup>13</sup> INDIA PEN. CODE Ch. 6, §121 accompanying notes (1860), reprinted in CHAKRAVARTI, *supra* note 8, at 551.

<sup>14</sup> C.S. KENNY, *OUTLINES OF CRIMINAL LAW* (1904). This was the basic textbook then-used in English law schools.

<sup>15</sup> S.F. HARRIS, *PRINCIPLES OF THE CRIMINAL LAW* (1912).

as one of my degree subjects. This did not seem to present any problems to the Adjutant General's Department which was responsible for organizing the trials. I was assured that the two Codes and any textbooks I might need would be given to me, and that as a "qualified lawyer" I would have no difficulty in "mugging up" all the law I would need to carry out my task as defending officer. Finally, I pointed out that the *Indian Manual of Military Law* was different from the *British Manual*,<sup>16</sup> which was the only one available in the Translation Section's office where I worked. In any case, I had not as yet had any occasion to consult it. Once again, I was assured that a volume would be provided and that I would have no difficulty. Bolstered by these assurances as to my competence, I agreed to undertake the defence.<sup>17</sup>

Having agreed to undertake the defence, I was presented with a copy of the charge sheet setting out the offences charged, together with the summary of the evidence which had been prepared by the prosecutor in the presence of the accused. The accused had heard the statements made by the witnesses to be called by the prosecution, whom they had been able to question, together with their own statements made in the absence of any defending officer. I visited my clients, explained my difficulties to them and asked whether they had any objection to my appearing for them. They were so pleased to have anybody defend them that it did not worry them that I was young—only 23—a British officer, almost certainly out of sympathy with their ideology, and completely lacking any court experience. I did explain, however, that I had now secured from the Prosecution Section of General Headquarters, India, copies of the two Codes, the *Indian Manual* and a copy of Ratanlal's book on the *Indian Law of Crimes*.<sup>18</sup>

The two men were charged with *Committing a Civil Offence*

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<sup>16</sup> See *MANUAL*, *supra* note 4.

<sup>17</sup> When I eventually saw the film *Breaker Morant*, I could appreciate from personal experience the difficulties that faced the defending officer in that case, although I was never faced with a tribunal which appeared to be completely under the influence of the Commander-in-Chief.

<sup>18</sup> RATANLAL & T. DHIRAJLAL, *THE LAW OF CRIMES* (22nd ed. 1971). This was the leading Indian work on the Penal Code at the time.

contrary to § 41 of the Indian Army Act, 1911,<sup>19</sup> the offence in question being *Waging War Against the King* contrary to § 121 of the Indian Penal Code,<sup>20</sup> which carried a penalty of death, transportation for life, or even a fine. According to the Indian Law Commission, the words "waging war against the King" "seem naturally to import a levying of war by one who, throwing off the duty of allegiance, arrays himself in open defiance of his Sovereign in like manner as a foreign enemy would do,"<sup>21</sup> and "waging" is used in the same sense as is "levying" in the English Treason Act of 1350.<sup>22</sup>

According to Ratanlal and Dhirajlal, "an assembly armed and arrayed in warlike manner for any treasonable purpose is *bellum levatum*, though not *bellum percutsum*. Lifting and marching are sufficient overt acts without committing to a battle or action."<sup>23</sup> No specified number of persons is required, and any individual found carrying arms on behalf of the enemy may be charged with waging war contrary to § 121 of the Indian Penal Code.<sup>24</sup>

The accused agreed that when captured they had been in uniform and carrying rifles given to them by the Japanese. They were supposed to use these weapons if they came upon any member of the British forces while gathering information behind the British lines, which they had easily infiltrated in view of their uniforms and appearance. Unfortunately, they still had in

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<sup>19</sup> Indian Army Act, 1911, § 41, *supra* note 7.

<sup>20</sup> INDIA PEN. CODE § 121 (1860) states: "Whoever wages war against the government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine." *Reprinted in CHAKRAVARTI, supra* note 8, at 550.

<sup>21</sup> INDIAN LAW COMMISSION SECOND REPORT ON THE INDIAN PENAL CODE, 1847, ¶ 10.

<sup>22</sup> *Id.* at ¶ 9, citing the Statute of Treason, 1350, 25 Edw. 3, stat. 5, ch. 2.

<sup>23</sup> See RATANLAL & DHIRAJLAL, *supra* note 18, at 282.

<sup>24</sup> It is of interest to compare these definitions with the statement in *Black's Law Dictionary*:

**Levying War.** In criminal law, the assembling of a body of men for the purpose of effecting by force a treasonable object; and all who perform any part, however minute, or however remote from the scene of action, and who are leagued in the general conspiracy, are considered as engaged in levying war, within the meaning of the constitution.

BLACK'S LAW DICTIONARY 907 (6th ed. 1990) (citing U.S. CONST., art. III, § 3 which provides: "(1) Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort."). *Id.*

their possession the Indian Army identity discs which had been issued to them upon their enlistment when they had taken an oath of allegiance to the Crown. Arguing that they were simple soldiers in Japanese hands acting under duress, I put in a plea of not guilty, and I pointed out that they had joined the INA after the British surrender at Singapore. At that time, General Percival as Commander-in-Chief had effected the surrender and instructed all Indian Army personnel to obey any orders given to them by the Japanese. Although this instruction was issued for their protection, the larger number of Indian personnel involved took it to mean that it included the Japanese order that they were now embodied in the Indian National Army, to which a new oath of allegiance was taken. From the point of view of international law, prisoners of war retain that status throughout their captivity, as may be seen in the decision of the British Military Court in the *Gozawa Trial*.<sup>25</sup> In the *Gozawa Trial*, the defence had contended that all Indian prisoners had become members of the INA and as such subsidiary units of the Japanese Army, they were subject to its discipline. While a prisoner of war might seek to join the armed forces of his captor, it should be noted that this is now almost certainly forbidden by the Prisoners of War Convention of 1949.<sup>26</sup> Article 130 states that "compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention"<sup>27</sup> constitutes a grave breach and, as such, is a war crime. In the case of the Indian National Army, duress of the most extreme kind was resorted to, including corporal punishment, torture and the like, while the *Gozawa* case indicated that no legal process was undertaken prior to the execution of a prisoner.<sup>28</sup> Moreover, under Article 7, "prisoners of war may *in no circumstances* renounce in part or in entirety the rights secured to them by the present Convention,"<sup>29</sup> and should they become members of the captor's force they obviously lose all the rights postulated in the Conven-

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<sup>25</sup> C. SLEEMAN, *THE GOZAWA TRIAL* (1945) (1948).

<sup>26</sup> Convention (III) Relative to the Treatment of Prisoners of War, 12 Aug., 1949, reprinted in SCHINDLER & TOMAN, *supra* note 12, at 423.

<sup>27</sup> *Id.* at 476.

<sup>28</sup> See SLEEMAN, *supra* note 25.

<sup>29</sup> SCHINDLER & TOMAN, *supra* note 12, at 432 (emphasis added).



tion for the protection of prisoners.<sup>30</sup>

Despite the efforts of the defending officer, it is perhaps not a matter of surprise that the two accused were found guilty and duly sentenced to death. However, my connection with my clients was not over. About two weeks after the trial, the prosecuting officer telephoned and inquired whether he should pick me up the following morning at 7 a.m. When I asked why this was being suggested, he asked, "Don't you want to see your clients hang?" I declined the offer, insisting that this was beyond my duties as defending officer, particularly as my clients had made no such request. Subsequently, I asked an acquaintance in the American military legal service for his views on this matter. He maintained that it had been my duty to attend the execution by arguing that Oliver Wendell Holmes considered it the duty of the defence to ensure that the method of execution was indeed that prescribed by law. He was not impressed by my contention that this was the task of the Governor of the jail, the doctor in attendance and any minister of religion present at the execution.

## II.

Having proved my competence as a defending officer to the satisfaction of the legal authorities at General Headquarters, I was ordered to repeat the performance in a case in which my "schoolboy" knowledge of international law became significant. Just as members of the Indian Army captured by the Japanese joined them by way of the Indian National Army, so too military personnel captured in Burma formed the Burmese National Army (BNA) under the command of Aung San who abandoned the Japanese as military fortunes in Burma changed. Aung San attached himself to the advancing British army, and became the first ruler of independent Burma. On this occasion it was a member of the BNA who became my client. Among the units left behind in Burma when the British withdrew was the Burma Frontier Force, subject for disciplinary purposes to the Burma Frontier Force Act.<sup>31</sup> This Force was more in the nature of a

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<sup>30</sup> See H. LEVIE, *PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT* 79-80 (1978).

<sup>31</sup> Burma Frontier Force Act, 1937, Official Publication Number V8-223. This document is available directly from the India Office-Library and Records, 197 Black Friars Road, London, England, SE1 8NG; telephone number, 81-928-9531.

police than a military force, so that employment of its members as police officers by the Japanese would not in any way be in breach of the duties of an occupant. In accordance with Article 43 of the Hague Regulations:<sup>32</sup>

[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>33</sup>

There was probably no better way to do this than through the existing police force. Should the members of the police force merely carry out the duties they normally performed and in no way go beyond this by co-operating with the occupant, it might be difficult to argue that any treasonable or other illegal act had been performed, particularly if there had been nothing like an oath of allegiance to the occupant. In similar fashion, consequent to the unilateral declaration of independence by the Smith regime in Rhodesia, the British authorities instructed the judiciary<sup>34</sup> to continue to function and enforce the legislative measures of the revolutionary administration so long as these did not exceed the powers granted to the former legitimate Rhodesian administration under the Southern Rhodesia (Constitution) Act,<sup>35</sup> as amended by the Southern Rhodesia Act.<sup>36</sup>

However, the position with regard to the Burma Frontier Force was complicated when, after its withdrawal, the Government of Burma established itself in Simla, India. The Governor, in accordance with the Burma Army Act, 1937,<sup>37</sup> issued a Notifi-

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<sup>32</sup> Annex to Hague Convention IV on the Laws and Customs of Warfare on Land, 18 Oct., 1907, reprinted in SCHINDLER & TOMAN, *supra* note 12, at 75.

<sup>33</sup> *Id.* at 88.

<sup>34</sup> Statement by Prime Minister Wilson in the House of Commons. See *Mr. Wilson Emphasizes Need For Effective Action Quickly*, Times (London), 13 Nov., 1965, at 7, col. 5. For a description of these events, see Green, *Southern Rhodesian Independence*, 14 ARCHIV DES VOLKERRECHTS 155, 163-66 (1969). See also *The King v. Maung Hmin et al* 13 Ann. Dig. 334 (Burma High Court of Judicature 1946); *Maung Hli Maung v. Ko Maung Maung* 13 Ann. Dig. 344 (Burma High Court (Appellate Civil) 1946) (post-liberation Burmese cases recognizing validity of judicial decisions of Burmese courts and Burmese judges functioning during Japanese occupation).

<sup>35</sup> Southern Rhodesia (Constitution) Act, 1961, 10 & 11 Eliz. 2, ch. 2.

<sup>36</sup> Southern Rhodesia Act, 1965, ch. 76.

<sup>37</sup> Burma Army Act, 1911, Official Publication Number V8-221. This document is

cation subjecting the Burma Frontier Force to the Burma Army Act, thus making it liable to Burmese military law, which for all intents and purposes was the same as that prevailing in the Indian Army. Under section 5 of the Act, "the Governor may, by notification, apply all or any of the provisions of this Act to any force raised and maintained under the authority of the Governor."<sup>38</sup> Section 41 of the Burma Army Act<sup>39</sup> was expressed in identical terms with the same section of the Indian Army Act<sup>40</sup> so that the charges were again Waging War Against the King.

The accused in this case had been only 19 at the time of the Government's withdrawal from Burma and was an ordinary sepoy<sup>41</sup> enjoying no rank of any kind. Again, the defence had to be conducted through an interpreter, this time it was one who spoke Burmese as well as Urdu, the *lingua franca*<sup>42</sup> of both the Indian and Burmese forces. The evidence against my client was somewhat different from that in the previous case. He was not in uniform, he had been captured behind British lines dressed as a civilian and he was in possession of a document in Japanese certifying him to be a member of the *Hikari Kikan*. Since I was originally employed as a Japanese translator, the prosecuting officer asked me if I would translate this document for him. This proved a simple matter, and I asked him if he was aware of the nature of the *Hikari Kikan*. It was in fact an underground intelligence organization somewhat similar to the British Force 136 which had been left behind in Burma, or the American OSS.<sup>43</sup> He assured me that he was aware of its character and I reminded him that at some stage he should bring this to the notice of the court, for as defending officer this was not my duty. The court was presided over by a permanent president<sup>44</sup> who had

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available at the India Office-Library and Records, 197 Black Friars Road, London, England, SE1 8NG; telephone number 81-928-9531.

<sup>38</sup> *Id.* at § 5.

<sup>39</sup> *Id.* at § 41.

<sup>40</sup> Indian Army Act, 1911, § 41, *supra* note 7.

<sup>41</sup> This was the lowest rank in the Indian Forces, which was equivalent to a private.

<sup>42</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 760 (Morris ed. 1975). "2. Any hybrid language used as a medium of communication between peoples of different languages." *Id.*

<sup>43</sup> The American Office of Strategic Services was the predecessor of the current Central Intelligence Agency.

<sup>44</sup> In the British forces at that time it was not uncommon for a senior officer of long

been in the Army some thirty years, while the Judge Advocate was a young newly qualified Indian officer. Because this was his first case, I suppose that now I would probably agree that from his point of view, the line of defence I put forward was completely unfair.

Basing my argument on my knowledge of international law, the difference between civil and military administration and the rights and duties of the police, I contended that the court had no jurisdiction of a criminal character since it was not illegal for a police officer to obey the commands of the occupying authority so long as they related to "public order and safety" as provided by the Hague Regulations.<sup>45</sup> Relying completely on my memory as a student, I further contended that as a police officer serving in that capacity under the occupying authority, it was permissible for him to "take an oath of obedience, but not of allegiance."<sup>46</sup> It came as no surprise when, accepting the advice of the Judge Advocate, the President of the court ruled that this contention was really a substantive defence to the charge rather than a plea to the jurisdiction. This, however, did not deter me and I then put forward a more confident plea that the tribunal lacked jurisdiction. This time I presented a variety of grounds that had nothing to do with the criminality or otherwise of the actions of the accused. While recognizing the validity of the maxim *ignorantia juris neminem excusat*,<sup>47</sup> it was submitted that this was not irrebuttable. The court was reminded that the Burma Frontier Force had been brought within the terms of the Burma Army Act<sup>48</sup> subsequent to the fall of Myitkyina, the city of Burma in which the accused had been serving and in which he

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service to be appointed as a permanent president of courts-martial. This avoided the constant use of officers lacking any experience of the conduct of courts-martial.

<sup>45</sup> Convention (IV) Respecting the Laws and Customs of War on Land, 18 Oct., 1907, reprinted in SCHINDLER & TOMAN, *supra* note 12, at 69.

<sup>46</sup> 2 L. OPPENHEIM, INTERNATIONAL LAW 445 (Lauterpacht 7th ed. 1952):

[The occupant] must not compel [local functionaries] by force to carry on their functions during occupation, if they refuse to do so, except where military necessity for the carrying on of a certain function arises. If they are willing to serve under him, he may make them take an oath of obedience, but not of allegiance. . . .

*Id.*

<sup>47</sup> "Ignorance of law excuses no one." BLACK'S LAW DICTIONARY 747 (6th ed. 1990).

<sup>48</sup> Burma Army Act, 1911, *supra* note 37.

had been left behind when the administration withdrew. This meant the accused would have been unaware of the change in his legal status and would have had no means of becoming aware of such change. Moreover, the court was reminded of the principle in Roman law that recognizes that ignorance of the law may be put forward as a defence on behalf of minors, women and soldiers.<sup>49</sup>

In addition, it was submitted that in accordance with the doctrine of *postliminium*,<sup>50</sup> the accused's legal status could not be adversely altered while he was in enemy hands; therefore, legislation purporting to make him subject to military law and the penalties attaching thereto could not apply. These arguments proved too much for the Judge Advocate. He indicated that since we were now in the realm of international law, it might be proper for the President of the court to invite the Judge Advocate General's representative<sup>51</sup> to hear and, if necessary, contest these arguments. I raised no objection and suggested that the case might well be covered by the principle laid down in *Rex v.*

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<sup>49</sup> 2 THE DIGEST OF JUSTINIAN Book XXII, ch. 6, § 9 (Mommson, Krueger & Watson ed. 1985). Roman law was then a subject of study for the London LL.B. examinations. *But see*, Rotterdam Bank Ltd. (Robaver) v. Nederlandsch Beheers-Instituut, 16 I.L.R. 428 (Holland, Supreme Court 1950); Damhof v. State of the Netherlands, 16 I.L.R. 429 (Holland, District Court of the Hague 1947, Court of Appeal of the Hague 1949, Supreme Court 1950); Landelijke Hypotheekbank Ltd. v. Receiver of Taxes for Amsterdam, 16 I.L.R. 430 (Holland, District Court of Amsterdam 1949, Supreme Court 1950). These decisions of the Supreme Court of The Netherlands upheld the validity in The Netherlands of legislation enacted by the Government in Exile in London. The publication of the Royal Decree in London was held to be valid when it could not be published in The Netherlands. *Cf.* In re Anthoine, 11 Ann. Dig. 273 (Belgium, Court of Appeal of Brussels 1940) for text of Belgian decree:

If as a result of military operations, an official or functionary . . . is unable to communicate with his superior authorities, upon whom he depends, or if these authorities have ceased to function, he exercises all the functions of these authorities within the framework of his professional activities and in so far as urgent needs require it.

*Id.*

<sup>50</sup> THE INSTITUTES OF JUSTINIAN (Sandars trans. 1900), Bk. I, ch. xii, § 5:

[I]f an ascendant is taken prisoner, although he becomes the slave of the enemy, yet his paternal power is only suspended, owing to the *jus postliminii*; for captives, when they return, are restored to all their former rights. Thus, on his return, the father will have his children in his power: for the *postliminium* supposes that the captive has never been absent.

*Id.* See also OPPENHEIM, *supra* note 46, at 616-20.

<sup>51</sup> The Judge Advocate General is the head of the Army Legal Service and is represented in each command area by an officer so designated.

*Bailey*.<sup>52</sup> The headnote to this case reads:

[A] prisoner was indicted for maliciously shooting; the offence was within a few weeks after the 39 Geo. 3, ch. 37 (a) passed, and before notice of it could have reached the place where the offence was committed. On case, the Judges thought he could not have been tried if the 39 Geo. 3, ch. 37 had not passed, and as he could not know of that Act, they thought it right he should have a pardon.<sup>53</sup>

It is not clear what the Judge Advocate General's representative thought of this argument, for he informed the court that responsibility for deciding whether any plea to the jurisdiction was valid or not was within the sole competence of the Judge Advocate at the trial in question. At this point, the latter asked for an adjournment so that "I may communicate with my gods," and they apparently instructed him to reject the plea and proceed with the case.

Once the prosecution opened the substantive case against the accused, the prosecuting officer presented the *Hikari Kikan* pass, together with a certified translation as an official exhibit. The President asked if the defending officer had seen the translation and whether he accepted it as authentic. On being assured that this was indeed the case, the President asked who had made the translation and the atmosphere in the courtroom was somewhat electric when the prosecutor replied, "The defending officer, sir." At this juncture, the President checked my credentials and noted that I was an officer with the Translation Section. Despite our earlier discussion as to the nature of the *Hikari Kikan*, the prosecutor failed to inform the court of its true underground character, so the accused benefitted from the court's assumption that this was merely another Japanese unit. While the accused was found guilty, it appears that my earlier arguments concerning jurisdiction had borne some fruit, for the sentence in this instance was one of transportation for life, rather than death. Because the Burmese National Army, under the command of Aung San, changed loyalties, participated in the ul-

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<sup>52</sup> *Rex v. Richard Bailey*, Russ. & Ry. 1 (1800).

<sup>53</sup> *Id.* "On case" is the English process by which a case was stated by one court and referred to a panel of judges for an opinion. The case involved a prosecution under The Offences at Sea Act, 1799, 39 Geo. 3, ch. 37.

timate attack on Rangoon and was able to secure Burma's independence in 1947, my client spent a mere two years in jail.

As a result of this particular decision and the manner in which the defence had been presented, the Prosecution Section changed its view of my usefulness as a defending officer. A request was submitted by the commanding officer of that Section for my official transfer from the Japanese Translation Section to the Prosecution Section. As an academic teacher of law, I have found this experience of appearing both as a defending and prosecuting officer in the same type of case a useful example to use when explaining defending counsel's ability to appear on behalf of a client in whose innocence he has the gravest doubts.

### III.

In the British Army during the Second World War it was not uncommon to assume that if an officer was or appeared to be competent in a particular aspect of a specialised branch of the service, he must clearly be competent in every subspecialty of that branch. Therefore, it was not surprising that while awaiting my transfer to the Prosecution Section I was called upon to act as the defending officer in an ordinary court-martial of a young officer. This case had nothing to do with either international law or the law of war; it involved charges that might be presented against a military officer either in peace or war.

Lieutenant L. left England and had been in India about ten days. I was informed that he was now under close arrest.<sup>54</sup> The summary of evidence sent to me disclosed that while on duty outside New Delhi's leading hotel, after malaria time,<sup>55</sup> a lance-corporal<sup>56</sup> in the Military Police felt something pressed into the small of his back and he was told "Reach for the sky, I'm

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<sup>54</sup> When under close arrest, a person must be under constant surveillance by his escort. It is distinct from open arrest, which permits the accused to move about freely within the camp area. See *MANUAL*, *supra* note 4, at 31.

<sup>55</sup> After dusk, malarial mosquitoes became a serious problem, and male military personnel were under orders to wear long pants and long-sleeved shirts and jackets. While it was an offence to become sick by one's own wrongdoing, as the contracting of malaria contrary to the dress order would have been, female personnel were not so restricted and were able to continue to wear short sleeves, no stockings and even backless gowns.

<sup>56</sup> The lowest non-commissioned rank in the British Army.

Lemmy Caution!”<sup>57</sup> He was somewhat surprised to find a British officer wearing shorts and shirt-sleeve order standing with two fingers forming a “gun.” He told the lieutenant not to be foolish and to go home. This apparently upset L., who knocked the M.P.’s cap off, and as the latter bent to retrieve it, L. “rabbit punched”<sup>58</sup> him. At this juncture, the M.P. thought he had best send for the Provost Marshal,<sup>59</sup> who arrived to find that L. had now wandered back into the hotel where he was happily flicking cigarettes from the mouth of any officer or civilian he came across. Fortunately they were tolerant and assumed that he must have been inebriated and lodged no complaint. However, the Provost Marshal saw things in a different light. He and his Deputy, who accompanied him, seized L., and without telling him he was under arrest,<sup>60</sup> they frogmarched him from the hotel and “placed” him in a military police truck that was waiting outside. At the subsequent trial there was some difference of opinion as to the “gentleness” with which this action was conducted. On returning to his tent, L. became sick and was permitted to obtain a handkerchief from his uniform trunk. He did so, and at the same time confronted the two military police officers with a pistol. This was wrested from him and he was “placed” on his cot. The camp sergeant major was in the next tent and later testified that he went to L.’s tent to investigate what was happening because he had heard a “thud, as of a sack of potatoes being thrown down.” L. was left under close arrest in the charge of another lieutenant—a rather strange procedure because normally the escort of an officer under close arrest should be senior to that officer. During the night the escort awoke to a noise. He found that L. was turning on his cot and placing his head at its foot. He explained the reason for this by saying that in this way “the ‘wog’ who wants to stab me through the tent window will miss.”<sup>61</sup>

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<sup>57</sup> He was the hero of Peter Cheney’s novels, which were extremely popular during World War II.

<sup>58</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1074 (Mottid ed. 1975). “A chopping blow to the back of the neck.” *Id.*

<sup>59</sup> Senior Military Police Officer.

<sup>60</sup> Under English military law, an officer must be informed that he is about to be arrested and the reason therefore. See MANUAL, *supra* note 4, at 31.

<sup>61</sup> Originally Royal Air Force slang, dating from about 1930, which was soon adopted



The charge sheet accompanying the summary of evidence opened by charging L. with an offence under § 16 of the English Army Act,<sup>62</sup> with conduct "unbecoming the character of an officer and a gentleman"—a charge invariably brought at every court-martial of an officer. The charge sheet proceeded to list a series of offences contrary to the dress order; assault of a military policeman; drunkenness; threatening the Provost Marshal with a pistol—in fact, I had the feeling that my client was charged with everything but murder and treason! When I visited him to discuss his defence, he informed me that he had already been in touch with his former commanding officer in England who had sent a cable in reply. This simply stated: "The last time this happened to you, you danced on the piano in the mess." I was able to persuade him that this was unlikely to be of much assistance in his defence. I asked what had happened. Apparently, soon after disembarking in Karachi he had suffered a mild attack of dysentery, from which he was still suffering when he moved to Delhi for posting to the front. He spent a day or two recuperating, during which he had read a couple of Cheney novels. The day of the incident was his first day out and he had visited the bar of the hotel for a drink. He was unaccustomed to heavy drinking, he had never before tasted Indian gin and the one sold at that particular hotel possessed a "kick" like that of the hind leg of a mule. He could not recall how many drinks he had consumed, but he stated that he had reached the bar at about 11 a.m. and remembered picking himself up off the floor of the gentlemen's lavatory at about 5:30 p.m. I assumed that he must have drunk a half-bottle or more.

Things looked bad and I saw little chance of any successful defence. I told L. that as I assessed the situation, he would be lucky if he were only cashiered<sup>63</sup> and then immediately conscripted as a private. I suggested that it might be a good idea if he were to write a letter resigning his commission on health grounds if we could get a psychiatrist's report to support him. L.

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by the Army, to signify a "Westernised Oriental Gentleman," particularly an Indian and soon extended to cover any "native." 2 PARTRIDGE, A DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH, 1353 (1961).

<sup>62</sup> English Army Act, 1881, 44 & 45 Vict., ch. 58, §16.

<sup>63</sup> The is the cancellation of an officer's commission and his dismissal from the forces with ignominy.

maintained that he was not mentally unsound, but eventually accepted my contention that a psychiatrist's report that he was somewhat imaginative and easily disassociated from reality did not in any way adversely affect his reputation. However, it might suggest that he was unlikely to be a suitable officer for action under fire. He asked for time to consider this proposal. On leaving L., I went across to the Prosecution Section and asked if I might discuss the case with my commanding officer-to-be. Having read the summary of evidence he asked what line of defence I proposed, and he was fully in agreement with the suggestion that L. must resign his commission. The colonel was somewhat intrigued when I said that on the basis of such a letter I proposed pleading to the jurisdiction on the ground that he was no longer subject to military law.

With L.'s agreement to submit his resignation, I contacted the Command psychiatrist and asked him to see my client. He explained that this could only be done at the request of the patient's commanding officer. The latter was not cooperative. He explained that L. was not really under his command in the normal sense, but was only in a holding capacity while he was under close arrest awaiting trial. There was no way that he would authorise a psychiatric examination. I again approached the psychiatrist who agreed that he would be prepared to attend as a defense witness but not as an expert. L. visited him, and I received a report indicating that he was perfectly sane but highly imaginative, and that having often played in amateur theatricals he frequently saw himself as the hero of any book he was reading (hence the identification with Lemmy Caution). I did not think that anything would be gained by calling the psychiatrist as a witness, particularly because I was hoping to stop the trial *in limine*.

The tribunal was composed of five officers on leave from the front, and it was presided over by a major rather than the permanent President. I immediately pleaded the lack of jurisdiction. I contended that if the resignation was accepted L. would no longer be under military administration, and he would therefore be immune from trial by court-martial. The Judge Advocate pointed out that L. was still in the army, that the resignation would not be retroactive and that, in any case, civilians in the Headquarters (India) Command Area were liable to military

trial. He therefore rejected the plea and the trial proceeded. We pleaded guilty to the § 41 and drunkenness charges, but we pleaded not guilty to all of the others. From the prosecution's point of view the trial was almost a comedy of errors. The lance-corporal who had been the victim of the assault had been posted, which resulted in an adjournment pending his recall. Under cross-examination he conceded that L. was totally drunk and that, far from being intentional assaults, both the removal of his cap and the rabbit punch could have been caused by the wild arm-flailings of a drunken individual. When the Provost Marshal gave his evidence it transpired that his account of "placing" L. in the truck differed rather from the lance-corporal's recollection of the same incident. He further denied that he had signed any documents in relation to L.'s arrest. Fortunately, I had in my possession the receipt he had signed for the pistol which he had left with the escort officer. In fact, both he and the escort would have been in breach of Army Regulations had no such receipt been handed over. The Provost Marshal was followed by his Deputy, and his examination-in-chief produced evidence that was somewhat out of line with that of his superior. Before cross-examination could take place, the luncheon adjournment was announced. I immediately asked for the witness to be kept *incommunicado* during the interval. The prosecutor objected vehemently until the Judge Advocate asked whether he was anxious for the defending officer to show during cross-examination that the witness had changed his story after talking to his commander. The objection was withdrawn, and the witness lunched with the President of the court.

On returning to the courtroom after lunch I had to pass by the office of the Military Police. I heard someone say: "There goes the little bastard that's gunning for our officers." I thought it wise to mention this to the Judge Advocate who duly informed the President. The latter opened the afternoon's proceedings by requesting attendance by the entire Provost personnel. He told them that "the defending officer is employed by the Prosecution Section, G.H.Q., and it would be wise if the Provost Corps bore this in mind." I then informed the court that during the interval, and in light of the evidence, L., acting on my advice, had now written a further letter withdrawing his earlier resignation of his commission. The fact that the tribunal was not

composed of the permanent members of a court-martial and that they were younger and on leave from active service might have made them somewhat more sympathetic to L. than might otherwise have been the case. L. was found guilty of the two charges to which he had so pleaded, and he was acquitted of all the other charges. He was given a severe reprimand, and a report of the reprimand would be placed upon his service record, which would probably delay any promotion. The Provost Marshal was told that he was never again to personally arrest an officer, while his Deputy was posted to Burma. L. felt we had won!

Thus ended my role as a defending officer. From then on I was employed by the Prosecution Section and, in addition to gathering evidence, I was more likely to prosecute than to defend. Moreover, in the future I would again be concerned with war law and the status of former prisoners of the Japanese.

#### IV.

The first case I was instructed to prosecute concerned the Commandant of the INA punishment camp together with his deputy. They had been captured when Rangoon was relieved and we possessed a great deal of evidence that they had boasted of being in the INA. In fact, the Commandant was a shaven Sikh who always announced that as a result he now "even looked like a Japanese." His new appearance made it difficult to secure much direct evidence against him, since a number of witnesses were no longer able to recognise him. A similar problem arises in connection with war crime trials held forty or more years after the end of hostilities. However, he was quite happy to acknowledge that he was indeed who we said he was. Evidence showed that both of the accused had been personally involved in recruiting propaganda on behalf of the INA, they had severely beaten resisters and had opened fire on a Gurkha camp. The personnel of the camp had maintained that since they came from the independent state of Nepal, they saw no reason to join a Japanese-sponsored force to fight for the independence of India, which they regarded as a foreign, if friendly, state. During this firing incident, some of the detainees were killed while others were so seriously injured that limbs had to be amputated.

In gathering evidence for this trial, I had one or two inter-

esting experiences. One of my witnesses was a subedar-major<sup>64</sup> in the Bahawalpur Infantry,<sup>65</sup> who was a Muslim. After the surrender he had taken the entire regiment into a mosque and reminded them that they had once taken the oath of allegiance to the English king. While they were in the mosque he had made them repeat this oath. Another was a Gurkha subedar-major who, we had been told, had been instructed by his captors to execute his British commander. He was presented with a Japanese sword to enable him to do this. Far from doing so, he was reported to have used this sword to decapitate the Japanese officer in question, and his picture now hung in a place of honour in his regimental mess. The Japanese officer assured me that he was very much alive and that the story was typical of those fabrications that one often comes across in the armed forces. He was perfectly willing to give evidence as a prosecution witness, but he pointed out that he had been a prisoner since 1942, he had been away from home for some three years before that, and he would like to have some leave before coming to Delhi. He told me that the Nepalese knew that his regiment had been liberated, and he feared that if he did not go home they would assume he was a traitor. I assured him that my colonel would send a telegram to his home telling his people that he was loyal and that he was staying in Delhi to give evidence against the INA. His reply astounded me: "Major, sahib, I am a subedar-major in the British forces,<sup>66</sup> my brother is a subedar-major; two of my sons are subedars; do you think they will believe an army telegram?" I feared I had no answer.

On one occasion I had to go to Lucknow to take statements from personnel who had been liberated and repatriated to the base there. At the time, my wife was an officer in the Women's Royal Indian Navy. She was in uniform, and she accompanied

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<sup>64</sup> In the Indian Army, officers were commissioned either by the King (KCOs) or the Viceroy (VCOs), as his local representative. VCOs were, in hierarchical order, jemadars, subedars and subedar-majors.

<sup>65</sup> Bahawalpur was a native state in India in treaty relations with the British crown. See *Sayce v. Ameer Ruler Sadig Mohammad Abassi Bahawalpur State*, [1952] 1 All E.R. 326, K.B., *aff'd* [1952] 2 Q.B. 390, C.A. Such states frequently raised their own forces, which were invariably attached to the regular Indian Army, particularly during time of war.

<sup>66</sup> Gurkhas have traditionally been recruited in Nepal to serve as separate regiments with the British forces, and not always with the Indian Army.

me as my secretary. One of the witnesses was making a statement when he stated that he had been "abused." On being asked what this meant, the interpreter refused to explain. In response to my urging, he stated that the witness had used a "bad word" which he was not prepared to translate in the presence of the "mem-sahib." It made no difference that, as I pointed out, the mem-sahib was an officer who was on duty. Eventually he did say that the witness had been called a "*haramzada*." My wife knew some Hindustani, and I asked her if she knew this word. All she could say was that she knew it was a word not used in polite society. Eventually the eyes of the interpreter lit up as he proudly announced: "Sir, he called him a man who has no father." He seemed somewhat shaken when I commented, "Oh, he called him a bastard." The witness himself was not impressed when I explained that such verbal abuse hardly amounted to an offence against the Indian Army Act or to a war crime. During the same interview, another witness stated that the accused had beaten him with the handle of a pickaxe, only to have the accused boast that had this happened he would have killed the witness, and he was prepared to demonstrate the truth of this remark either before me or during his trial.

## V.

Before this case came to trial, my Colonel in the Prosecution Section was to appear in a case involving three senior officers, two of whom had achieved the rank of Major General in the INA, while the other was a Colonel. One of the accused was a Muslim, the second a Hindu and the third a Sikh. The case was considered of such significance that the prosecution was to be led by the Advocate-General of India.<sup>67</sup> The defence was led by Mr. Bulabhai Desai, probably India's then-greatest advocate,<sup>68</sup> assisted by a group of top-flight lawyers. In fact, even Nehru put on his gown and occasionally sat among the defence lawyers. It was clear, therefore, that this trial<sup>69</sup> was going to be reported in India as a great political event involving claims that

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<sup>67</sup> The leading counsel for the government, though not a member thereof.

<sup>68</sup> For the text of his closing address, see DESAI, *supra* note 11.

<sup>69</sup> See TWO HISTORIC TRIALS IN RED FORT (Moti Ram ed. 1946) (hereinafter RED FORT).

the three accused were patriots fighting for the independence of India under the leadership of the "Provisional Government of Free India."<sup>70</sup> The "president" of this faction was Subhas Chandra Bose,<sup>71</sup> who was allegedly killed in a Japanese air crash shortly before the liberation of Rangoon.

Not long before the trial was to commence, one of the accused reported sick and I was ordered to accompany him to the hospital. Strangely enough for one who had renounced his loyalty to the British crown, he claimed he was entitled to be treated at the British officers' hospital, rather than the one normally used by other Indian ranks. He then tried to suborn me by appealing to my known sympathies for Indian independence, and he also tried to find out what line the prosecution would be taking at the forthcoming trial. I reminded him that his conduct was not only improper, but that he was laying himself open to further charges under the Indian Army Act, to which he was still amenable as an officer in an Indian regiment despite his having joined the INA. The defence conducted by Mr. Desai turned largely on the form of the British surrender at Singapore, General Perceval's subsequent instruction to the Indian troops and the political relations between the "Provisional Government of Free India," the Japanese and other Axis powers which had extended recognition to them. In fact, at times one was inclined to wonder whether what was taking place was a court-martial or a series of lectures on various aspects of international law, in particular the conditions of statehood and recognition. To buttress these arguments, a number of Japanese political and military personnel in Allied hands, who were awaiting interrogation with a view to their own possible trials for war crimes, were brought in as defence witnesses at the Indian government's expense, and subsequently were returned to captivity in Japan for further interrogation.

The presence of these witnesses necessitated the employment of Japanese interpreters. The defence insisted that these interpreters were to be civilians rather than officers of the Intel-

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<sup>70</sup> For documents relating to the "Provisional Government," see FORMATION AND GROWTH OF *The Indian National Army* (Azad Hind Fauj) (Singh ed. 1946).

<sup>71</sup> For a biography of Bose, see H. TOYE, *THE SPRINGING TIGER: A STUDY OF A REVOLUTIONARY* (1959).

ligence Corps working in the various translation departments of the armed forces. Fearing that the ability of these interpreters might leave something to be desired, my Colonel required me to sit with him as his personal interpreter to check that the translations of evidence were in fact correct. It did not take long to persuade him that not only had I never learned to speak Japanese, but that much of my written Japanese had been lost through non-usage.

Despite the highly political nature of this trial, the court agreed with the prosecution's arguments that the accused had remained commissioned officers of the Indian Army; they were still bound by their oaths of allegiance; and they remained subject to the Indian Army Act. All three were duly sentenced to death, but the Viceroy saw fit to pardon and release them.

After this "show trial"<sup>72</sup> had taken place, my own case was due for hearing. The accused were jointly charged with waging war against the King, three charges of murder, two charges of causing grievous hurt and two charges of abetment. When I prepared the charge sheet, the charges were listed with the most serious offense, waging war, appearing first. Before the trial opened, I was summoned by the Adjutant-General<sup>73</sup> who was accompanied by the chief political advisor to the Government of India. I was ordered, by instructions from the Viceroy, that my charge sheet was to be amended so that the waging war charge was to appear as the last charge on the sheet. The waging war charge was responsible for the adverse political agitation by Indian political parties, both Congress and the Muslim League. I reminded them that I was appearing against Indian counsel, that waging war was the most serious charge that could be lodged under the Indian Army Act and the Penal Code<sup>74</sup> and that the Indian defence lawyers would consider that I had lost my sense

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<sup>72</sup> For apparently political reasons, the trial was held in the Red Fort in Delhi, the place in which Bahadur Shah II, the last Mogul Emperor of India, had been tried and sentenced to transportation for life in 1857. This trial occurred at the end of the Indian Mutiny, now generally described in India as the Sepoy Rebellion. See RED FORT, *supra* note 69, at 423.

<sup>73</sup> At that time, the Prosecution Section was part of the Adjutant General's Department of the Army.

<sup>74</sup> See Indian Army Act, 1911, *supra* note 7; INDIA PEN. CODE § 121 (1860) reprinted in CHAKRAVARTI, *supra* note 8, at 550.



of proportion if I were to proceed in this way. I was then told that not only was the charge sheet to be set out in this way, but no evidence was to be presented on this charge. My request for permission to drop the charge was rejected, and I was instructed to proceed. Since murder charges were involved, it was decided that I should be led by one of India's most senior British counsel.

This case presented interesting features which we had not previously encountered. The murders and beatings were alleged to have occurred during an attack on the Gurkha camp on 24 August, 1942, while the two charges of abetment related to events in September. The waging war was alleged to have continued from September, 1942 through the end of April, 1943, although this charge was now somewhat irrelevant. Under § 67 of the Indian Army Act<sup>76</sup> there was a time bar of three years preventing a trial by court-martial, save for a few specified offences—none of which was an issue in the present case. The court-martial opened on 15 December, 1945, which was beyond the statutory time limit. Exercising his powers under the Government of India Act, 1935,<sup>76</sup> the Governor-General<sup>77</sup> promulgated an Ordinance amending § 67 to read:

No trial by court-martial of any person subject to this Act for any offence, other than an offence committed after the 7th day of December, 1941, while the person in question was a prisoner of war or was present in enemy territory, or an offence of mutiny, desertion or fraudulent enrollment shall be commenced after the expiration of three years (*in the computation of which period time spent by the person in question after the aforesaid date as a pris-*

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<sup>76</sup> Indian Army Act, 1911, § 67, *supra* note 7.

<sup>76</sup> Under The Government of India Act, 1935, 25 & 26 Geo. 5, ch. 42, sch. 9, § 72: The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian legislature; but the power of making ordinances under this section is subject to the like restrictions as the power of the Indian legislature to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature, and may be controlled or superseded by any such Act.

*Id.*

The six month period requirement had been repealed by the India and Burma (Emergency Provisions) Act, 1940, 3 & 4 Geo. 6, ch. 33.

<sup>77</sup> The Viceroy was also Governor-General.

oner of war or in enemy territory or in evading arrest shall be excluded) from the date of such offence . . . [and] "enemy territory" means any area at the time of the presence therein of the person in question under the sovereignty, or administered by, or in the occupation of a State at that time at war with His Majesty.<sup>78</sup>

It would appear that someone among the Governor-General's advisors had become aware of the line of defence that I had presented on behalf of my Burma Frontier Force client and made use of it now that it appeared it might be of benefit to the prosecution.

Immediately the case commenced, and the defence played the card that I had used in the past. The defence pleaded the lack of jurisdiction. Defence counsel contended that the Ordinance was *ultra vires* on the ground that § 67 could not be amended more than three years after the commission of the acts alleged, that it was in any case retroactive and thus it was contrary to the rule of law as understood in Anglo-Indian jurisprudence. However, I persuaded my leader, the colonel, to respond by arguing that the Ordinance did not revive a time-barred offence, but removed what was purely a time-barred procedural limitation allowing a case to be tried by a court whose jurisdiction would otherwise have lapsed.<sup>79</sup> Moreover, it was not until the accused had been recovered by the British authorities that there was any real potential for trial and I maintained that the three year period should only be computed from such time as it became feasible for proceedings to have been initiated.

The defence next contended that the terms of service which existed at the time of a man's enlistment could not be altered without his consent, particularly if he was on a term of years enlistment, arguing in fact that there was a contractual relation-

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<sup>78</sup> Ordinance amending § 67 Indian Army Act, 1911, promulgated October 31, 1942, Official Publication Number V8-111, available directly from the India Office-Library and Records, 197 Black Friars Road, London, England, SE1 8NG; telephone number 81-928-9531.

The 7th of December, 1941 was date of both the attack on Pearl Harbor and the British declaration of war against Japan.

<sup>79</sup> For similar contentions regarding the competence of the Israeli courts to try Eichmann, see Green, *The Maxim Nullum Crimen Sine Lege and the Eichmann Trial*, 38 BRIT. Y.B. INT'L L. 457 (1963).

ship between a soldier and his sovereign. This argument was met with short shrift; the Judge Advocate pointed out that an enlistment engagement could not be construed as a contract of employment.<sup>80</sup> It was further argued that, as had been seen during the time of the "big trial" in the Red Fort when anti-British demonstrations had taken place throughout Delhi, the trial itself was likely to disrupt the peace and good government of India. The amending Ordinance contributed to such disruption by permitting the trial, and it was therefore itself creative of emergency. The court held that it was solely within the Governor-General's discretion to assess whether an emergency existed, to take what steps were necessary to deal with it and that his assessment could not be questioned.

Finally, the defence did not know that evidence would not be presented on the waging war charge; the defence argued that this was a civil offence under the Indian Penal Code. Therefore, it fell within the requirements of § 196 of the Criminal Procedure Code, which provides that no court shall take cognizance of any offence punishable under Chapter VI of the Indian Penal Code (in which the waging war offence appears), unless upon complaint made by order of, or under authority from the Provincial Government or some officer empowered by the Provincial Government.<sup>81</sup>

The Judge Advocate advised the Court to dismiss the plea to the jurisdiction and his reasoning warrants recording:

The procedure of a court-martial is regulated by the Rules made under the Indian Army Act, and these Rules contain no provisions equivalent to § 196 of the Criminal Procedure Code. This Code does not apply to courts-martial except in so far as certain sections of it have been specifically made applicable by the Indian Army Act, or any other Act of the Indian Legislature. A court-martial, unlike an ordinary criminal court, does not proceed upon the complaint of anyone, nor does it, in my opinion, "take cognizance" of any offences. A court-martial is constituted by the convening order, and continues only so long as the particular matters referred to it are undecided. It has no power to direct that any person shall be tried before itself. Moreover, when a court-martial

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<sup>80</sup> For a similar U.S. holding, see *Johnson v. Powell* 414 F.2d 1060 (5th Cir. 1969).

<sup>81</sup> INDIA CODE CRIM. PROC. §196 (1898) reprinted in CHAKRAVARTI, *supra* note 8, at 143.

and an ordinary criminal court have concurrent jurisdiction to try an offence, § 69 of the Indian Army Act gives direction to the military authorities to determine by which court the offender will be tried, and there is no restriction in this section requiring the military authorities to obtain prior sanction from anyone. In my opinion, therefore, § 196 of the Criminal Procedure Code is irrelevant to the present trial, as are the submissions of the learned counsel for the defence based on this section.<sup>82</sup>

The colonel and I now assumed that the trial would proceed. However, immediately after the court opened, the defence counsel informed us that a Delhi sub-judge (magistrate) had issued an *ex parte* injunction against the members of the court, the convening authority, the colonel and myself, and that pending a hearing, the court was without jurisdiction to proceed. The colonel argued that the order of the civil court was null and void, since an injunction "cannot be granted to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such a restraint is necessary to prevent a multiplicity of proceedings. . . ."<sup>83</sup> Because § 193 of the Indian Penal Code provides that a trial before a court-martial is a judicial proceeding,<sup>84</sup> there was no possibility of there being a multiplicity of proceedings. Finally, he contended that the court was concerned with a criminal matter, and "an injunction cannot be granted to stay proceedings in a criminal matter." The Judge Advocate did not rule on these arguments, but recom-

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<sup>82</sup> This quotation is taken directly from the transcript at trial. The author has expressed his desire to maintain the anonymity of the defendants. For this reason, the citation has been intentionally omitted. For clarification purposes, the pertinent statutes are cited herein. See INDIA CODE CRIM. PROC. § 196 (1898) reprinted in CHAKRAVARTI, *supra* note 8, at 143; The Indian Army Act, 1911, § 69, *supra* note 7. Compare with the U.S. Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1988), which provide that even "[a] serviceman on leave from duty and out of uniform could be tried by the military for the robbery of a civilian business establishment. While the civilian courts also had jurisdiction to try the accused, this did not invalidate the military jurisdiction." D. ZILLMAN, A. BLAUSTEIN, E. SHERMAN, D. FAW, M. LARKIN, J. MUNSTER, JR., J. PAUST, R. PECKHAM & A. RAKAS, THE MILITARY IN AMERICAN SOCIETY: CASES AND MATERIALS, § 3.02 (1978).

<sup>83</sup> This quotation is also taken directly from the transcript at trial. The author has expressed his desire to maintain the anonymity of the defendants. For this reason, the citation has been intentionally omitted.

<sup>84</sup> For clarification of the pertinent statute, see INDIA PEN. CODE § 193 (1860) (Explanation 1) reprinted in CHAKRAVARTI, *supra* note 8, at 595.

mended an adjournment, "solely out of courtesy to the learned judge who, in making the order which he did, was acting, after all, in a judicial capacity." My leader and I then proceeded to the magistrate's court to hear the claim for the grant of a permanent injunction against us. The judge dismissed the defence application on the technical grounds that the 60 days notice as required under § 80 of the Civil Procedure Code<sup>85</sup> had not been given to the military personnel concerned, and that the consent of the Governor-General to institute the proceedings had not been obtained as required under § 270(1) of the Government of India Act.<sup>86</sup>

By virtue of this decision, all obstacles in the way of proceeding with the trial were now removed and the court-martial at last got under way. As we returned to the court, I received a note from the senior defence counsel asking me to join him and his colleagues in their retiring room. Upon doing so, I was first asked why I was not proceeding with the waging war charge. When I pointed out that I was a military officer carrying out orders, they understood completely. To some extent my position was vindicated when we learned, while this discussion was proceeding, that no further waging war charges were to be presented. They next reminded me—as if this were necessary—that I was not an Indian lawyer and not expert in Indian criminal law. They offered me the use of their library and any technical advice that I might need. During the trial I had further evidence of professional brotherhood, although this time on a military as distinct from a legal level. I was walking through the camp in which the INA personnel were held when I was approached by an INA major-general, a former lieutenant-colonel in the British Indian Army. He asked if we might walk and talk. He said: "Major Green, we know you are trying to put a rope

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<sup>85</sup> INDIA CODE CIV. PROC. § 80 (1908).

<sup>86</sup> Government of India Act, 1935, 25 & 26 Geo. 5, ch. 42, § 270(1) provides: No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province in his discretion.

*Id.*

around our necks. If we get the chance, we'll put a knife in your back." Thereafter, I always had a Gurkha covering my back when walking through the camp.

One of my most important witnesses was the Gurkha subedar-major previously referred to in relation to the "non-murder" of his British officer.<sup>87</sup> On the morning he was due to give evidence he came and inquired what language he should use in court. I reminded him that the language of the Indian Army and of its courts-martial was English,<sup>88</sup> although we would be using two interpreters since the accused spoke two different Indian languages, that he himself held a Higher School certificate in English and that he would have to make his own decision. I rose to begin formal examination and he gave all the details of his birth, military training and education in English, but as soon as I asked my first substantive question he asked for a Gurkhali interpreter. When the President referred to his English competence, the witness explained: "Brigadier sahib, men's lives depend upon my evidence. It is essential that I fully understand every question that is put to me." Counsel on both sides were a little distressed, for it now meant that every question would be put in English, translated into Gurkhali and then translated into the two languages of the accused. The witness would then be required to answer in Gurkhali, his answer would be translated into English and then translated into the languages of the accused. The prospects for satisfactory cross-examination were not very good, nor were they improved by the number of occasions when the witness answered the English question in English, and had to be reminded that he was obliged to wait for the three translations before replying.

The problem of the defence in relation to cross-examination of Gurkha witnesses was further illustrated when I put on the stand an uneducated sepoy who had lost an arm as a result of the firing incident at the camp. He was the subject of one of the grievous hurt charges. Defence counsel asked the witness to describe what had occurred on the day of the shooting, and the

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<sup>87</sup> See *supra*, text accompanying notes 64-66.

<sup>88</sup> In fact, the INA found that its attempts to use Hindi as a *lingua franca* were a dismal failure and rapidly reverted to English. For a definition of *lingua franca*, see *supra* note 42, at 760.

witness began to recount everything that had happened beginning with the sounding of reveille at 6 a.m. and proceeded with an almost minute-by-minute account of his doings. Counsel wanted to know about the firing which had occurred at about 3 p.m., and somewhat exasperated, he repeated his question only to receive the same response. After this had happened four times, the presiding Brigadier suggested that it was clear the witness knew what had happened on the day in question, and if we were to get on with the trial, perhaps it would be best if counsel allowed him to tell his tale in his own way.<sup>89</sup>

While the trial was in progress I was informed that I had been granted a Class-B Release<sup>90</sup> in order to take up a teaching appointment in international law at my old school, University College London.

## VI.

My connection with the Indian National Army did not terminate with my departure from the trial. The experience served to provide material for the first public lecture I delivered as an academic. Moreover, when I visited India in 1954 to attend an International Law Association Conference, it was known that I had been involved in the INA trials, and since INA personnel were now regarded in independent India as national heroes, the Government of India provided me with an armed bodyguard. When I received a tea invitation from one of the defence counsel in my last trial, I had the greatest difficulty in preventing my escort from entering the house and staying with me. He made it

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<sup>89</sup> I had one other experience with Gurkha witnesses. A number of them had been recovered with the liberation of Rangoon and Singapore, and they had been brought to Delhi as potential witnesses. One morning, my Colonel called me in and with a smile informed me that they had accused me of crime against humanity and that I had better go and find out what it was all about. I knew that while the Gurkhas had been in the Japanese prison camp they had been on short rations, usually a small quantity of rice. Because of this, thinking I was being magnanimous, I had given orders that they were to be given meat. I had forgotten that their basic food *was* rice. Hence the complaint! My apology was graciously accepted.

<sup>90</sup> At the end of hostilities, releases from the Army (Class A) were normally based on a points system depending on length of service. However, if a special case could be made, an earlier release (Class B) could be secured. This was granted at the request of those seeking to employ or otherwise secure the release of the concerned. It was not granted at the person's request.

clear that if I were not out in 45 minutes he would come in to get me. At the presidential dinner for delegates he actually stood behind my chair. While at University College, I was for some years responsible for the admission of graduate students in law. In 1956, an Indian student appeared, and after examining his record I informed him that he was unqualified for admission. He surprised me by stating, "But sir, you owe me special consideration." When I asked the reason, I was told "During the war you tried to hang my uncle"—as indeed I had, but I fear that this argument in no way made up for his lack of qualifications. As late as 1958 I had further evidence that my role in the INA affair had not been forgotten. I was in New York for an international law conference when an Indian lawyer greeted me. He was P.K. Roy, senior legal counsel to the International Civil Aviation Organization (ICAO), and had been the chief civilian lawyer advising the Indian government authorities on the trials while I was with the Prosecution Section. We remained friends until he returned to India from Montreal on his retirement from the ICAO. Then, in 1972, after delivering a lecture in the Delhi bar library on war crimes, an Indian lawyer asked me if it was my first time in India. I told him that I had already been there three or four times, and he replied, "Yes Major Green, British Army 1944-46." I asked him how he knew, and it transpired he had been a junior defence counsel in the case I had been prosecuting when I left for home.

Even when my wife and I were on embarkation leave awaiting repatriation to England I discovered that my "reputation" as a military lawyer was well known. While our ship was in dock waiting to sail, the Officer Commanding Troops (O.C.) sent for me and informed me that I was to take a summary of evidence against the ship's Adjutant. Apparently, the O.C. had given orders that his administrative staff was not to fraternize with the crew, who were Merchant Navy and not under military command. The Adjutant had done so, and I was amazed to find that when we sailed he had been left behind under close arrest on a charge of disobeying orders, with my summary of evidence as the basis of the charge against him.

I was still not finished. The O.C. sent for me and ordered me to take a summary of evidence arising from a charge against a corporal who was alleged to have struck a sergeant major.



Once again my wife acted as secretary. The facts were intriguing. It was a family ship which was somewhat crowded. The corporal was married to an Anglo-Indian and the sergeant major to an Anglo-Burmese, both of whom were in the same cabin, as were their children. The corporal's wife entered the cabin to find the other lady's son by a previous marriage going through her suitcase. She accused him of stealing cigarettes, she called him a thief and cast doubts on his legitimacy as well as the respectability of the sergeant major's wife. A fight between the two women ensued, in the course of which one threw a thermos of boiling water over the other. The husbands intervened and tried to separate the fighting women. It was in the course of this effort that the alleged blow was struck. During the taking of the summary I learned a great deal of army language and Anglo-Saxon and other curses used in a variety of forms that I had never dreamed possible. I told my wife not to include the ripper of these in the record. As a result, neither woman was willing to sign the summary as a true record of what had happened. It took a great deal of arguing on my part before they were convinced that at any trial that ensued they would be able to give their evidence as fully as they liked and in words of their own choosing. I explained that, for the purposes of a court-martial, the summary was in fact just that, and by no means intended as a verbatim record of everything said. Eventually they were convinced, and I felt that I could now treat the rest of the voyage as a holiday pending disembarkation in Scotland. However, I had forgotten the nature of the O.C.

Since the ship was carrying wives and children and was fairly crowded, orders had been issued forbidding smoking between decks. This ruling was perhaps more observed in the breach than otherwise and in due course I was summoned again. The O.C. informed me that two sergeants, who had been in the Army for the entire length of the war and both of whom had excellent records, had disobeyed the order and I was to organize the taking of a summary of evidence and then preside over the subsequent court-martial. I tried to persuade him that this could be dealt with by the most summary of procedures before himself, and that it was hard on men proceeding home for discharge to be faced with what might be a stain on an otherwise clean military record. However, he was adamant. On checking the

British *Manual*<sup>91</sup> I found that I had not held my commission long enough to serve as the president of a court-martial, so I was instructed to serve as prosecuting officer. The court was to be comprised of a single officer who had previously been a member of a court-martial, while the defence was in the hands of a Royal Air Force officer who had been a solicitor in civil life. The O.C. did make one concession. He agreed that the trial would be held in the Warrant Officers' lounge, and it would be open to anyone wishing to attend. The evidence against the two was clear, but the President considered a reprimand sufficient punishment. My only consolation was that when the trial was over the two accused thanked me for a fair deal, while other NCOs, who had watched the proceedings, expressed the opinion that if that was how army justice was conducted, they hoped that if they ever came before a court after demobilization they were afforded an equally fair trial.

Even when I went to Singapore in 1960 as Professor of International Law, I found that my notoriety as an army lawyer involved with the INA had preceded me. When I was introduced to local members of faculty, two of them told me that they had been a little concerned about my joining the University staff since they had been locally recruited as doctors in the Indian National Army and were not sure how I would react. In fact, we became friends. More intriguing was the call I received from the Colonel in charge of the Judge Advocate General's Department. He inquired whether I was on the Reserve of Officers and whether I still possessed my uniform. I answered the first question in the affirmative and the second in the negative. He stated that he was sure that a uniform could be found for me. In replying to my inquiry as to what this was all about, he informed me that he was initiating a court-martial against a captain and wanted me to defend on the condition that if I lost I would appeal to the Courts-Martial Appeal Board and ultimately to the House of Lords. Apparently, in view of the Indonesian "konfrontasi,"<sup>92</sup> Singapore was an active duty station and any officer

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<sup>91</sup> MANUAL, *supra* note 4, at 46.

<sup>92</sup> When Malaysia was established in 1963, Indonesia condemned it as a British imperialist creation and instituted a "confrontation" involving the infiltration of Malaysia and Singapore of armed infiltrators. See, e.g., *Public Prosecutor v. Koi* [1968] A.C. 829;

to marry required his commander's permission. The officer in question wished to marry a lady who was suspected of being a Communist agent, and he had made it clear that the marriage would go ahead regardless of the views of his commanding officer. I suggested that the matter could be settled quietly by arranging for the officer to be posted away from Singapore. However, the Judge Advocate's Department wanted to have the case treated as a test case. They were convinced that the requirement of consent in the case of an officer of mature years was illegal, and they wanted it overturned. They felt sure that the court would uphold the order, but that on appeal it would almost certainly be thrown out. The thought of once again being in uniform—and almost certainly securing a free trip to London—appealed to me and I agreed to defend. I was rather annoyed when I received a call two days later to inform me that my potential client had "broken off his engagement," and my services would therefore not be required!

#### CONCLUSION

In the long run I suppose I can say that, even though I started knowing little about Indian military or criminal law and even less about legal practice, I did not fare badly and I learned a great deal. I also have the satisfaction of knowing that I am one of the few lawyers who has had the opportunity to both defend and prosecute charges of treason—while not yet twenty-five years old! Perhaps far more important is the fact that this wartime experience led to my interest in terrorism and, more significantly, to my specialising in the law of armed conflict. This has resulted in: My serving as legal advisor to the Canadian delegation to the Geneva Conference on Humanitarian Law in Armed Conflicts from 1975 to 1977;<sup>93</sup> lecturing to legal officers in the Canadian Armed Forces; preparing the first draft of the *Canadian Manual of Armed Conflict Law*;<sup>94</sup> publishing my own *Su-*

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[1968] 2 W.L.R. 715; [1968] 1 All E.R. 419, P.C. See also *Mohamed Ali and Another v. Public Prosecutor* [1969] 1 A.C. 430; [1968] 3 W.L.R. 1076; [1968] 3 All E.R. 488, P.C.

<sup>93</sup> Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 10 June, 1977, reprinted in SCHINDLER & TOMAN, *supra* note 12, at 605.

<sup>94</sup> L. GREEN, *CANADIAN MANUAL OF ARMED CONFLICT LAW* (is awaiting publication by the Canadian government).

*perior Orders in National and International Law*<sup>95</sup> and *Essays on the Modern Law of War*.<sup>96</sup> It may well be that my experience as a simple graduate in the law with international law as one of his degree subjects may serve to encourage others should the need arise.

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<sup>95</sup> L. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* (1976).

<sup>96</sup> L. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* (1985).