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The "Right to Wage War" against Empire: Anticolonialism and the Challenge to International Law in the Indian National Army Trial of 1945

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This Article treats the Indian National Army Trial of 1945 as a key moment in the elaboration of an anticolonial critique of international law in India. The trial was actually a court-martial of three Indian officers by the British colonial government on charges of high treason for defecting from the British Indian Army, joining up with Indian National Army forces in Singapore, and waging war in alliance with Imperial Japan against the British. In this trial, the defense made the radical claim that anticolonial wars fought in Asia against European powers were legitimate and just and should be recognized as such under international law. The aim of this Article is to draw attention to the understudied role of anticolonial movements in challenging the premises of international law in the aftermath of World War II.

In the waning months of the debate on Indian Independence in the British House of Commons in 1947, Winston Churchill, leader of the opposition, charged Prime Minister Clement Attlee with hastening Britain's "shameful flight" from India (Churchill 1947). In point of fact, however, remaining in India beyond 1947 was no longer a matter of choice for Attlee or the British government. Claude Auchinleck, Commander-in-Chief of the British Armed Forces in India, made clear the key reason for this hasty departure in a secret letter to the Chiefs of Staff written in November 1945. Maintaining that "most Indian officers [in the Army] are nationalists," he warned

> If the Indian forces as a whole cease to be reliable, the British Armed Forces now available are not likely to be able to control the internal situation or to protect essential communications . . . . To regain control of the situation . . . nothing short of an organized campaign for the re-conquest of India is likely to suffice. [And] . . . if the Indian Armed Forces are not prepared to support Government, they will almost inevitably actively oppose it. Further such active opposition is not likely to be confined to India alone. Disaffection will inevitably spread to Indian troops now being employed by His Majesty's Government in overseas theaters such as Burma, Malaya, Java, and the

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> Middle East . . . . The situation in India, is therefore, extremely delicate.[1] (Mansergh and Moon 1970–1983, 576–84)

Auchinleck's warning was a timely one. Within the next two years, Britain would indeed lose the allegiance of a substantial portion of Indian soldiers and officers. Imperial rule over India was simply no longer possible. While Gandhian nationalism had succeeded in making the civilian masses of India "ungovernable" through a series of noncooperation movements beginning in the 1920s and ending in the Quit India Movement of 1942, the event largely responsible for reversing the allegiance of Indian soldiers to the British Empire was in fact the 1945 Indian National Army (INA; Hindi *Azad Hind Fauj*) trial.[2] This trial triggered a series of events that took the British Empire by surprise and hastened its departure from India (Banerjee 1981; Dutt 1971; Madsen 2003; Spector 1981).

Thus, what had started off as a trial of three INA officers accused of waging war against the British Empire soon turned into a riveting examination of the empire itself in both the court of law and, more importantly, the court of public opinion. In the end, success in the former was overshadowed by failure in the latter. The recognition of this loss is evident in Auchinleck's order soon after the trial commuting the sentences of the three convicted INA officers, who were set free with only forfeiture of pay and allowances. Auchinleck later disclosed his reasons for the order in a letter to Army Commanders in which he expressed his agreement with the opinion of a majority of Indian officers in the British Indian Army: "Any attempt to force the sentence would have led to chaos in the country at large and probably to mutiny and dissension in the army, culminating in its dissolution" (Marston 2014, 141).

Auchinleck's order could not, however, prevent the outcome that he feared. As the trial ended, the British Empire faced hostility on an unprecedented in scale in the form of widespread mutinous disaffection in the Royal Indian Navy and units of the British Indian Army and Royal Indian Air Force and mass public agitation against British rule. The British government could no longer rely on the allegiance of the Indian armed forces that had played a decisive role in the acquisition and preservation of the empire, not only in India but throughout Asia, Africa, and the Middle East.

The three INA officers were charged with high treason for defecting from the British Indian Army, joining up with the Indian National Army, which had formed in Singapore under the leadership of Subhas Chandra Bose, and subsequently waging war against the King-Emperor of India in March 1944.[3] Because British censorship in

1. Claude Auchinleck (1884–1981) joined the Indian Army in 1904. In 1943, he was appointed Commander-in-Chief of Indian forces (Connell 1959).

2. The Quit India Movement was the final mass civil disobedience movement launched by Gandhi in August 1942 with the goal of complete independence from the British Empire. It was accompanied by mass demonstrations and strikes all over the country (Hutchins 1973; Wolpert 2006). The Indian National Army trials were a series of courts-martial of officers of the INA held from November 1945 to May 1946 (H. Singh 2003; L. Green 1948); the focus in this Article is on the first and most famous of them.

3. Subhas Bose's arrival in Singapore and the war that he subsequently launched against the British colonial state in India was the final phase of a long journey seeking support from the Axis Powers for India's struggle for independence. A staunch opponent of both the early Congress politics of pleading and petitioning and of Gandhi's method of non-violent agitation, Bose had been elected President of the Indian National Congress in 1938 and 1939 by its radical left wing but had resigned in frustration over its politics

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India occasioned by the Second World War extended through September of 1945, the Indian people first learned about the INA's war for India's independence when the British colonial government announced its intention to try the three officers in August 1945 and during their subsequent trials (Ghosh 1969; Lebra 1971; Fay 1995; Singh 2002; Bayly and Harper 2005; Borra 1982; Bakshi 2016; Kuracina 2010). The nation was stunned by the news that a sovereign Indian state had been formed in Singapore in 1943 and that it had initiated a war against the British Empire in India. Soon after the first trial commenced on November 5, 1945, a nationwide mass movement rose up in support of the three officers. Pictures of them and Subhas Bose began to appear everywhere draped in garlands of flowers.[4] Of particular concern for the British administration was the public support that the INA defendants received from the officers of the British Indian armed forces. This support was evident in a letter written by members of the Royal Indian Air Force stationed in Calcutta to the Bengal Congress Committee and published on November 11, 1945 in the newspaper *The Hindustan Standard* in which the officers condemned "the autocratic action" of the government and openly praised the men on trial as the "brightest jewels of India," whose "noble ideal" and course of action were "commendable and inspiring" (Ghosh 1969, 229).

Given the significance of the INA trials, surprisingly little scholarly work has been done by legal and political historians of India on their role in the story of decolonization.[5] This gap in the literature is due in part to the assumptions underlying the dominant historiographical narratives about Indian freedom. While the nationalist narrative has been based on the claim that Indian independence is almost entirely attributable to the nonviolent resistance movement led by Mahatma Gandhi and the Indian National Congress, the imperial historiographical narrative holds that, insofar as an unarmed resistance movement could not have posed a real threat to a mighty empire, Britain's granting of independence to India was an act of benevolence (referred to

in 1939, only to be imprisoned by the British for his attempts to organize mass anticolonial protests in Calcutta. The outbreak of the Second World War provided Bose with the opportunity to form military alliances with major world powers with the goal of compelling the British to end colonial rule. Bose planned and executed a daring escape from Calcutta on January 19, 1941, and traveled in disguise to the Soviet Union, then Germany, and finally, in 1943, to Imperial Japan, where he found the most receptive audience for his plans to invade British India. For Bose's role in the Indian independence movement, see: Bose 2011; Pelinka 2003; Getz 2002; Gordon 1990; H. Mukerjee 1977; Ayer 1951; G. Mookerjee 1975; and Toye 1959.

4. Bose is believed to have died in a plane crash on his way to Russia after the defeat at Imphal. However, a significant portion of the Indian population even today rejects this narrative in favor of a conspiracy involving the British, the Russians, and the leadership of the Indian National Congress to assassinate Bose before he could return to India to popular acclaim. Given that Bose's popularity at the time of the trial was equal to Gandhi's, had he returned, the Indian National Congress may have been compelled, many believe, to declare him India's first Prime Minister. Several commissions of enquiry, including the Shah Nawaz Commission (1956), the Khosla Commission (1970), and the Justice Mukherjee Commission (1999–2005), were set up by the postcolonial Indian government to investigate Bose's death, but their conflicting findings have not resolved the issue.

5. Work that focuses specifically on the INA trials includes: H. Singh 2003; L. Green 1948, 47–69; Alpes 2007, 135–58; Rubino 1954; Lee 1985; and Sellars 2017, 825–45. Sellars's article examined the INA trials briefly in the context of a legalist reading of the development of the concepts of "crimes of treason" and "complicity" in twentieth-century international law. However, neither the historical construction of an anticolonial perspective on international law in the trial based on a sustained critique of the links between empire and international law nor the discursive significance of the trial for Indian independence have received close scrutiny, while general works on Bose's movement offer little or no analysis of the INA trials.

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in this strand of historiography with the anodyne phrase "transfer of power").[6] Thus, while the dominant narrative either has attributed the mass uprisings in the last two years of British rule entirely to Gandhi's inspiration or viewed them as spontaneous freedom movements, the imperial narrative has downplayed the significance of the formation of the INA, the trials, and the revolt of the Royal Indian Navy in the story of Indian freedom. Surprisingly, even the subaltern school of historiography—which has challenged both the imperial and nationalist narratives by emphasizing the agency of marginalized groups and voices in the story of Indian freedom—has overlooked the significance of the INA trials for decolonization.[7] The fact that Bose sought alliances with the Axis Powers (Germany, Italy, and Japan) during the Second World War and ultimately received help from the Japanese army in his efforts to liberate India contributed in no small measure to the reluctance on the part of his contemporaries and historians alike to acknowledge the roles of Bose and the INA in Indian history.

At the heart of the INA trial was the question of the legal status of both the British Empire and the anticolonial war of independence against it. The counsel for the defense, led by Bhulabhai Desai, an anticolonial activist and one of the country's leading lawyers, vigorously challenged the legal assumptions behind British rule in India.[8] Desai used the trial to critique the relationship of empire and law publicly and to defend the INA's anticolonial war as moral and just, thus redeeming in discourse a war that had been lost on the ground. The defense thus offered a new vision of international law, challenging in particular the historical anchoring of the existing Eurocentric discourse of international law in empire, a discourse according to which the only legitimate wars were those fought by empires to preserve their territories while all other military conflicts were characterized as "aggressive." By claiming the unconditional right of colonized subjects to wage wars of liberation against their colonial rulers and arguing that the armed forces of the Indian state-in-exile formed in Singapore deserved the status of belligerents under international law, the defense contested the notion that the interests of empire should form the basis of international law. The British Empire found itself exposed in this trial to an alternative vision that, by offering historical, political, and legal justifications for the INA's campaigns against the British Indian Empire, challenged its fundamental premises. This counter-perspective is the primary focus of this Article.

What is distinctive about the INA trial—and thus makes it so significant for understanding the nature of empire and the anticolonial struggle—is that this was the first major political trial in which an Indian lawyer invoked the discourse of international law to claim the right to national self-determination and freedom. In previous

6. The classic work of imperial historiography is Seal 1968; for nationalist historiography, see, e.g., Sitaramayya 1969. Marxist historians, such as Chandra 1988, share the nationalist view of independence.

7. Important work in subaltern historiography includes Guha 1997; Chatterjee 1986, 2012; Chakrabarty 2007; Cohn 1987; Dirks 1987; Skaria 2001; and the various authors of the Subaltern Collective, e.g., Guha et al. 1982–1996. Important work on the subaltern school and Indian legal history has been done by Baxi 1993, 247–64.

8. Born and educated in Gujarat, Bhulabhai Desai (1877–1946) joined the Indian National Congress and worked closely with Gandhi in pursuit of Indian independence. Remarkably, Desai, according to his biographer M. C. Setalvad (1968), constructed the defense almost entirely by himself and spoke *ex tempore* when addressing the court. He was also quite ill at the time of the trial and died within six months of its conclusion. See also Cohn 1996; Hussain 2003; M. Mukherjee 2010.

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political trials in India, such as the Sedition Trial of Bal Gangadhar Tilak in 1908 and Gandhi's trial in 1922, while the accused had challenged the sovereignty of the British colonial state and even its claim to the allegiance of the colonized subject, they did not do so by invoking international law.[9] It was also unprecedented in the history of political trials in colonial India for Indian lawyers to assert publicly the right of the Indian people to wage a violent struggle for national independence.

This Article is intended as a contribution to the literature on the history of international law that has been critiquing the nature and limits of the universalistic claims of international law, intertwined as it was with the imperatives to maintain and expand empire.[10] It also draws attention to the need to take seriously the role of resistance, enacted at multiple sites both within and without formal institutions, in the story of modern international law. Of particular interest here is the resistance articulated by radical anticolonial voices in the effort to overcome the limitations imposed by international law on the causes of self-determination and freedom.[11]

HISTORICAL CONTEXT OF THE TRIAL

Although the British colonial government came to regret its decision to prosecute the leading officers of the INA at the time—P. K. Sehgal, Shah Nawaz, and Gurbaksh Singh Dhillon—the court-martial was expected to fulfill several strategic objectives.[12] First, since former officers of the British Indian Army were involved, there was the intent to deter similar "acts of treason" by Indian soldiers and officers and to restore discipline within the army. Also, given the intensity of the anticolonial agitation and mass civil disobedience in India over the preceding five years, the trial represented an opportunity for the colonial government to reaffirm legal sovereignty over India. Moreover, the success of Gandhi's non-violent movement may have led the colonial government to believe that the INA's effort to use force to achieve the same end lacked

9. In the recent past, legal historians of India have emphasized the importance of political trials in colonial India for understanding the discursive encounter between the colonizer and the colonized. See M. Mukherjee 2005, 2017; Noorani 2008; Kamra 2016; and Kaviraj 2006.

10. One of the first scholars to study the historical relationship between international law and empire was C. H. Alexandrowicz (Alexandrowicz, Armitage, and Pitts 2017); see also Anghie 2006, 739–53; Koskenniemi 2001; Benton 2002; Benton and Ford 2016; Pitts 2018; Fitzmaurice 2014; and Fassbender and Peters 2012.

11. Scholars of the collective known as the Third World Approaches to International Law (TWAIL) have played a particularly critical role in this regard. See in particular Anghie 2005; Chimni 2004; Baxi 2006; Rajagopal 2003; and Becker Lorca 2016.

12. Prem Kumar Sehgal (1917–1992) served in the British Indian Army from 1936 to 1942. As a captain, he fought against the Japanese in Malaya and was taken prisoner. He then joined the INA and served as a commander in the campaign against the British in Burma. Shah Nawaz Khan (1914–1983) also rose to the position of Captain in the British Indian Army and was taken prisoner by the Japanese after the defeat of the British in Singapore in 1942. He joined the INA in 1943 and served as a member of cabinet in Bose's provisional government in Singapore. As an INA commander, he led a campaign into northeast India and captured Kohima and Imphal from the British. After independence, he became an important member of the Indian National Congress and chaired a committee in 1956 that looked into the circumstances of Bose's death. Gurbaksh Singh Dhillon (1914–2006) joined the British Indian Army as a soldier in 1933 and was sent to Singapore in 1941 and like the others was taken prisoner by the Japanese. As an INA commander, he fought bravely in Burma. See Khan 1946; and Dhillon 1998.

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popular support in India and would be condemned by the Indian National Congress and public opinion.

The trial was held at the Red Fort in Delhi, which served as the military headquarters of the British Indian Army, with Major General Alan Bruce Blaxland presiding.[13] Blaxland was assisted by a seven-member board of officers in a manner akin to a jury in a civilian court. Judge-Advocate F. C. A. Kerin was responsible for summing up the case for the board and for providing rulings on matters of law, practice, and procedure. The board of officers was charged with reaching a verdict of either guilt or innocence. Apart from the Judge-Advocate, none of the military officers had any legal training or experience.

As alluded to earlier, the INA was founded on September 1, 1942, in Singapore under the command of Captain Mohan Singh. Its core force consisted of 55,000 Indian soldiers of the British Indian Army who had been taken as prisoners of war after the British Indian forces surrendered to the Japanese on February 15, 1942 at Singapore and set free two days later (L. Green 1948, 47). Under the leadership of Subhas Bose, the INA became a capable fighting force, being reinforced by Indian plantation workers, both men and women, from Singapore, British Malaya, and other parts of Southeast Asia (Ayer 1951). When he took over leadership of the INA, Bose simultaneously formed the Provisional Government of Free India and declared war on Britain and its allies. Germany, Italy, Burma, Thailand, Croatia, Manchukuo (Imperial Japan's puppet state in China and Mongolia), the Philippines, and "free" China immediately recognized the new Indian state-in-exile, which was also congratulated by Irish Republicans.

The INA's declaration of war on Britain was made in March 1944. Aided by the Japanese and Burmese armies, the INA crossed into British India and advanced as far as Imphal but was forced to retreat by the British Indian Army. It was in the immediate aftermath of this retreat, which concluded in July 1944, that the decision was made to try the three captured INA officers.

In August 1945, when the British administration declared its intention to try them, Indian newspapers such as the *Amrita Bazar Patrika* and the *Hindustan Times* at once began publishing editorials and reports declaring the accused national heroes and condemning the trial as an affront to the nation (Alpes 2007, 142). With the lifting of wartime censorship the following month and as reports of the INA's battles spread, support for the three officers grew substantially.

So manifest was the national outrage at the British decision to try these officers that the Indian National Congress, which had opposed Bose all along and had refused to support or even recognize the Provisional Government of Free India in October 1943, decided to ride the tide of public opinion by assuming responsibility for defending the accused (Kuracina 2010, 817–56; Alpes 2007). Thus, the Congress established an INA Defense Committee that included its best legal minds, including the aforementioned Bhulabhai Desai, Tej Bahadur Sapru, Asaf Ali, K. J. Katju, and future Prime Minister Jawaharlal Nehru (Mansergh and Moon 1970–1983, 339–41).

13. The choice of the Red Fort venue is itself a reflection of the unexpected nature of the mass movement that the court-martial evoked. Otherwise, the government would have realized that holding the proceedings at the same site where the last Mughal Emperor, Bahadur Shah Zafar, had been tried and convicted by the British for leading the rebellion of 1857, would evoke bitter memories. See further, Dalrymple 2008.

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When the trials commenced, on November 5, 1945, they resulted in the disclosure of detailed information about the INA and its struggle against British rule. The evidence adduced by both the prosecution and the defense, the testimony of Indian and Japanese eyewitnesses, and, ultimately, Desai's speech for the defense, galvanized the Indian people and sparked spontaneous rioting and mass agitation across the country. Thus Calcutta, Bombay, Patna, Karachi, Rawalpindi, Banaras, Allahabad, and many other cities and towns witnessed violent protests in which British personnel came under attack and Indian protestors were killed. The trial also precipitated a moral crisis among the soldiers of the British Indian army, who learned in the course of it that their compatriots had been fighting a patriotic war of national independence, while they had been defending an empire that had colonized their country and continued to oppress its people. The fact that the three officers proudly proclaimed their roles in the war and refused to plead guilty even at the risk of hanging for treason only deepened the dismay of the soldiery. Thus, in the aftermath of the trial, the very idea of a British Indian Army —an imperial army—became untenable: the identity of the armed forces had now come to be grounded in that of the nation to such an extent that there could only be either a British Army or an Indian Army. For millions of Indian soldiers in the British Indian Army, the only way to catch up with a history that seemed to have passed them by and to resolve their moral crisis was to rise in mutiny against the British (Sarkar 2009, 1–90; Brailsford 1946, 57–58; Moon 1973).

THE PROSECUTION: ANTICOLONIAL WAR AS CRIME AGAINST THE IMPERIAL MONARCH

The prosecution, led by the Advocate General of British India, Sir Noshirwan P. Engineer, put forward two major claims regarding the nature of British imperial sovereignty and colonial subjectivity (Ram 1946, 5–20, 219–65).[14] He first asserted that the British King-Emperor's right of sovereignty over the allegiance of all of his Indian subjects was unconditional. According to this reasoning, since all Indians were necessarily subjects of the empire and had no legal status without it, the Indian National Army, which claimed to be the military arm of the free state of India outside the British Empire, was illegal by its very nature. Thus the prosecution asserted:

> The Provisional Government of Free India was itself an illegal body and the formation of that body was itself an offense against the State and neither that body nor any tribunal constituted under it nor any order of authority derived from such a body can be recognized by this court, all of them being unlawful (Ram, 1946, 264).

The second charge was that, in actively recruiting Indian prisoners of war, the accused had participated in human rights abuses against those soldiers who refused to fight for the INA. The prosecution asserted that, even when the accused were aware that "atrocities were being committed openly and notoriously" against Indian troops in

14. The Advocate General was assisted by the military prosecutor, Lieutenant Colonel P. Walsh.

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order to force them to join the INA, they made no effort to intervene. In the final days of the war, it was alleged, the accused had gone so far as to murder or abet the murder of INA soldiers seeking to cross over to the Allied side (Ram 1946, 2–3, 17–20).

The prosecution further argued that the case must be tried within the framework of the Indian Army Act and the Indian Penal Code, which was the "municipal law" of India because British Indian courts were not empowered to decide matters of international law. The officers were to be tried as individuals who had engaged in criminal activity, not as soldiers of a warring state. Thus, the Advocate General argued:

> This court is not sitting as an international court. It has not to decide the question between different States or between one State and a subject of another state.... This court is sitting as a court duly constituted under the Indian Army Act to try persons who are subject to the Indian Army Act for offences which are made punishable under the Indian Army Act and the Indian Penal Code (Ram 1946, 230).

Later in the trial, the Judge-Advocate F. C. A. Kerin agreed with the prosecutor's argument on this point when he told the board of officers that they were expected to try the case, not by international law, but by the "laws in force in British India" (Ram 1946, 275).

Under this system of laws, which was grounded in the subordination of the colonized, any form of violent resistance to empire was considered illegitimate. The monopolization of all "legitimate" violence by the British imperial state in India, and its corollary, the criminalization of all acts of anti-colonial resistance against it, had occurred in earnest in the aftermath of the Revolt of 1857, the last major violent uprising to threaten the colonial state. Soon after the suppression of that revolt, the East India Company ceased to govern India, responsibility for which was assumed by the British Crown in 1858. But the Revolt brought home to the British government in India both the fragility of the colonial state and the need to forestall any collective violent resistance in the future.[15] Thus the Arms Act in 1878 criminalized the possession and distribution of all firearms in India (Simla 1892; Cunningham 1891). Though this Act did not eliminate violent resistance, it gave the colonial state unprecedented power to disarm the Indian population. Henceforth, all collective attempts to resist the colonial state through violence were dependent on smuggled arms and were labeled "criminal plots" punishable under the Indian Penal Code. In sum, all acts of resistance to empire were individualized, criminalized, and silenced as they were absorbed into the framework of law-and-order discourse.

It was within the context of this legal framework that the prosecution charged the accused, who, as commissioned officers of the British Indian army, were subject to the Indian Army Act. Treason, as a civil offense under Section 121 of the Indian Penal Code, was punishable by death or transportation for life. The motives behind the war were therefore irrelevant to the prosecution's case. By waging war against the

15. For a comprehensive treatment of the Revolt of 1857, see Dalrymple 2008. For a more general discussion of the implications of 1857 for British policy in India, see Hutchins 1967 and Metcalf 1994.

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King, the accused had violated the "duty of allegiance" that was "owed to the Crown at all times and in all circumstances (Ram 1946, 6)."[16]

THE DEFENSE—A PEOPLE'S RIGHT TO WAGE A WAR OF LIBERATION

Faced with the law of imperial sovereignty that made allegiance to the monarch mandatory and criminalized acts of anticolonial rebellion, Desai had three options in crafting his defense arguments (Desai 1954; subsequent references to Desai's defense strategy are taken from this text). He could, on the one hand, present evidence proving that the defendants had not committed the acts of murder and treason of which they were accused. On the other hand, he could argue that the colonial administration had, through its own actions, lost the legal right to claim allegiance from the defendants and go on to appeal to the imperial justice of the crown against the colonial administration in India on the grounds that they had remained loyal to the imperial monarch even as they were fighting the colonial administration in India (Mukherjee 2010, 105–49). As a third alternative, he could challenge the legal basis of the trial itself.

Desai in his defense drew on the first two arguments to some extent, presenting circumstantial evidence both that the accusations against his clients were baseless and that Britain had lost the right to claim their allegiance when they had been taken prisoners of war by the Japanese. However, since the case was being tried as a court-martial and the charges were framed by the Indian Army Act and Indian Penal Code, it was the defense's burden to resolve a number of jurisprudential difficulties. First, it was unclear how subjects of the British Empire (which is what the accused were) could claim the right to fight against their own government. Second, there was a question regarding the legal justification for the defendants' actions as soldiers of the Indian National Army. Finally, it was necessary to contest the absolute right of imperial sovereignty while still framing the actions of the defendants in the context of some form of law.

Desai overcame these difficulties by challenging the very legal framework within which the case was being judged, rejecting what the prosecutor termed "municipal law" in favor of "international law." What was really at issue in this trial, he argued, were not individual acts of treason but rather the larger question of whether, under international law, a colonized people had the right to wage a legitimate war. This argument contained two distinct but overlapping components, first that a war of liberation fought by a subject people against a European empire should be considered moral and just, and second that soldiers of a state formed to fight an empire should be treated as belligerents rather than criminals subject to municipal law (Desai 1954).

In making this argument, Desai engaged the question at the heart of contemporary debates regarding warfare and European international law, namely which parties had the rights of belligerents under international law (Graber 1949; Nabulsi 1999; Best 1983).

16. The insistence on "the duty of allegiance owed to the Crown at all times" was no mere rhetoric on the part of the prosecution, for, within the juridical discourse of imperial sovereignty that was asserted in the post-1857 period, the imperial monarch as an "impartial judge" alone could ensure order and peace in India, characterized now as a land of ceaseless conflict and disorder. See M. Mukherjee 2010.

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For the dominant tradition of international law founded on the writings of Grotius and Hobbes, the sovereign state was the subject of law; the international order was the object of the law of nations and was based on agreements among powerful states. From this perspective, law was a tool for maintaining civil order that belonged to the most powerful states, so that any form of rebellion or resistance to this order was by its very nature illegal. The key issue within this tradition was not the morality of the causes of a war but rather the regulation of conflicts through "laws of war." Thus "just wars" could only be fought by sovereign states, and the right of belligerency was limited to the professional forces of an existing state. Populations fighting foreign occupiers and invaders, by contrast, had no rights of belligerency within this dominant tradition of international law, so that all civilians who participated in hostilities or rebelled against the civil order that existed under a state were labeled insurgents and outlaws (Tuck 1983; Yasuaki 1993).

While dominant, the Grotian conception of war, it is important to note, was not the only one in modern Europe, having been contested in the late eighteenth and into the nineteenth century by what Karma Nabulsi (1999) has called a "republican tradition of war," one articulated most powerfully by Rousseau (2012). Influenced by their experiences with wars of conquest, foreign rule, and military occupation, these republican writers in Europe argued that, while wars of conquest waged by states were unjust, wars of self-defense fought by citizens of a republic who came to its defense in times of crisis were just. Placing the values of liberty, civic love, and patriotism above the state's need for order, Rousseau and his followers saw military occupation as an affront to collective and individual freedom that had to be resisted by civilians at all costs. Thus every civilian fighting on behalf of his country was a lawful combatant in this tradition, and the right of belligerency belonged more to the citizen defending his republic than to the professional soldier fighting on behalf of conquering states. The republican tradition thus blended notions of "just war" and "justice in war" and insisted that both the origins and conduct of war had to be subject to considerations of morality. Republican ideas found a wide audience, playing important roles in, for example, the American War of Independence, the French Revolution, and the Corsican Rebellion (Howard 1978; Best 1982).

Desai began his speech for the defense by proclaiming the "right to wage war with immunity on the part of a subject race for their liberation" (Ram 1946). He thereby rooted his argumentation genealogically within two discursive traditions of legitimate popular warfare against occupation, one that had developed in India over the past century to justify violent resistance to colonial occupation and the other being the republican tradition of war developed in Enlightenment Europe.

In India, even as Gandhi's nonviolent resistance had become the dominant discourse of anti-colonialism in the Indian National Congress, a parallel discourse of violent popular resistance to colonial occupation was also being voiced by such leaders as Bal Gangadhar Tilak, Bhagat Singh, and, most importantly, Subhas Bose. This tradition traced its genealogy to the Revolt of 1857, in which, as already mentioned, large portions of the military and civilian population of India rebelled against the British East India Company's government. Also referred to as India's First War of Independence, the Revolt of 1857 was the largest and most determined anti-colonial conflict that any European power had faced up to that point.

While for tactical reasons Desai did not refer directly to the 1857 uprising during his defense arguments, its influence on his thinking is revealed in his private conversations with friends outside the courtroom during the trial. Speaking with an Indian military officer ten days into it, an excited Desai noted the angry and turbulent mood of the country and observed approvingly that "as things were going now, it may lead to armed revolution" (Connell 1959, 802–03). His radical tactic, then, of anchoring his defense in the subject's unconditional right to anticolonial war, was inspired by, and a response to, the all-consuming patriotic fervor among the people of India, for whom Subhas Bose and the officers of the INA had emerged as national heroes and martyrs. In the theater of a public trial at the Red Fort, on which all eyes were focused, Desai was simultaneously constructing a legal defense for the war fought by the INA, manifesting the defiant patriotism of the Indian people, and legitimizing an anticipated armed revolution.[17] What was important for him, as he told one of the accused, was that he was pleading the case, not before the British court, but before the bar of public opinion and the world (Dhillon 1998, 503).

In the trial itself, Desai justified the subjects' right to rebellion with reference to the republican discourse of war described above. That right, he asserted, was recognized by British national law and enshrined in British history, as was evident in the Magna Carta, and in the twentieth century had come to form an important part of international law as well. He pointed out that the British government had recently recognized émigré governments during the Second World War formed by the Dutch, the Poles, and the French seeking to liberate their nations, that men fighting in armies of liberation had been given the status of belligerents under international law and thus protected from prosecution for engaging in war. Desai cited such British statesmen as Winston Churchill and Anthony Eden who in Parliament had affirmed "if liberty and democracy are to have any meaning all over the world, and not merely just for a part of it . . . any war made for the purpose of liberating oneself from foreign yoke is completely justified by modern international law" (Desai 1954, 27).

However, Desai made the American War of Independence his primary point of comparison as a national war of liberation (Endy 1985). Thus, he cited the claim in the American Declaration of Independence that, if a government fails to protect the "inalienable rights" of its people, "it is the right of the people to alter or to abolish it, and to institute new government" (Desai 1954, 78–79). Rejecting the prosecution's assertion that the "duty of allegiance" was "owed to the crown at all times and in all circumstances," Desai went on to assert that, in a war for national freedom in which

17. Jawaharlal Nehru, one of the members of the Defense Committee, in a letter to Auchinleck five months after the trial, gave him what he called "a glimpse into his [my] mind" at the time of the trial. "It is sometimes said," he wrote, "that we have exploited the I.N.A. situation for political purposes . . . . I can say with some confidence that there was no desire or even thought of exploiting the I.N.A issue . . . when it first came before the public . . . . I had not appreciated the political and international approach of some of the leaders of the Indian independence movement in South-East Asia . . . . Then a strange and surprising thing happened . . . . Within a few weeks the story of the I.N.A. had percolated to the remotest villages in India and everywhere there was admiration for them and apprehension as to their possible fate. No political organization, however strong and efficient, could have produced this enormous reaction in India . . . . The widespread popular enthusiasm was surprising enough, but even more surprising was a similar reaction of a very large number of regular Indian Army officers and men. Something had touched them deeply. This kind of thing . . . cannot be done by politicians and agitators." (Connell 1959, 817–19).

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loyalty to king and country were in conflict, it was not simply the right but indeed the duty of a subject people to wage war against the latter. Just as "men of honor in America chose allegiance to their own country to the imposed allegiance to a foreign King" when a conflict arose between the two, so "the Indians in East Asia, the proud citizens of the Provisional Government of Azad Hind," had chosen allegiance to their country over that to an alien king (Desai 1954, 81–82). In keeping with republican theory, Desai was asserting, then, that the war of liberation fought by the Indian people against the British Empire was moral in its origins and therefore just.

The assertion of parallels between the INA's war and the American War of Independence was a strategic legal move intended to highlight the international wrongs committed by the British Empire and to drive a wedge between it and the United States as those powers sought to establish a new world order in the interwar period in Asia and elsewhere (Green 2017). Desai was well aware that the center of gravity for international law had after the First World War increasingly shifted from Europe to the United States (Allen 2016). As a consequence, Indian anticolonial leaders including Bal Gangadhar Tilak, Lala Lajpat Rai, and Mahatma Gandhi himself had since worked tirelessly to internationalize the struggle against the British Empire through propaganda efforts in the United States. As Erez Manela (2007) has argued, Woodrow Wilson's description of self-determination as a key principle in international relations at the end of the First World War became a rallying call for anticolonial movements worldwide. Thus, Tilak traveled to Europe during the Peace Conference in Paris to bring the case for Indian self-determination to the attention of world leaders and wrote to Wilson to urge that the Peace Conference apply the principle of self-determination to India (161–66). Even after this attempt failed, Lal Lajpat Rai, another prominent Indian anticolonial leader, emphasized the importance of "extensive propaganda" in America in the 1920s (175). As for Gandhi, once he took the reins of the Indian anticolonial movement, he wrote frequent letters to American newspapers and organizations.[18] Thus in a 1932 missive, Gandhi spoke of the parallel between America's War of Independence against British rule and India's anticolonial struggle, being careful, however, to emphasize the particular path taken by the latter: "Even as America won its independence through suffering, valor, and sacrifice, so shall India in God's good time achieve her freedom by suffering, sacrifice, and nonviolence" (1972, 1).

Significantly, by 1941, President Franklin Roosevelt had become quite sympathetic to the cause of Indian independence and even raised the issue in his conversations with Churchill in Washington in December (Dallek 1995, 319; Dulles and Ridinger 1955; Weigold 2008; Green 2017). In March of the following year, Roosevelt in a letter to Churchill again raised the possibility of India's receiving autonomy on terms similar to the original US Articles of Confederation (Churchill 1950, 213–19, cited in Dulles and Ridinger 1955, 7). He warned that, if Britain did not grant India autonomy and "India should subsequently be successfully invaded by Japan with attendant serious military or naval defeats for our side, the prejudicial

18. Gandhi's writings in this regard include a "Message to America" on April 5, 1930 (Gandhi 1972, 180), a telegram sent to a supporter named James Mills (Gandhi 1971, 315), a statement broadcast on the CBS network on September 13, 1931 (Gandhi 1971, 8–10), and "To American Friends," dated August 3, 1942 (Gandhi 1979, 357).

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reaction on American public opinion could hardly be over-estimated" (Kimball 1994, 446). In a show of sympathy for the cause of Indian independence, Roosevelt also sent diplomat William Phillips to meet with Gandhi in 1943; and when British officials in India refused to allow the meeting, Phillips declared that the time had come for Britain to release its hold on the country (Clymer 1955, 128–66). From the perspective of this discourse, Desai's speeches can be seen to have been addressed as much to the American government as to the British court and the Indian public.

CHALLENGING THE IMPERIAL ORDER'S MONOPOLIZATION OF THE RIGHT TO WAR

While Desai in his speech for the defense drew on the republican theory of war in insisting on the Indian people's right to wage war for liberation, he was well aware of the European exceptionalism that anchored the discourse of rebellion and resistance even within the republican tradition. Republican theory assumed that political liberty was the birthright of people of European descent; the colonized and so-called "uncivilized" peoples of Asia and Africa, by contrast, did not enjoy this inherent right but rather had to be tutored in its exercise. Republican writings thus focused on the right of rebellion within the European and the American context and gave short shrift to the right of non-European colonized peoples to oppose European empires.

Desai, however, drew on the republican recognition in asserting that the INA's war was legitimate under existing international law because it was fought by an established state, in this case represented by the "Provisional Government of Azad Hind." Because the men on trial were not ordinary insurgents but rather soldiers of a state formed to fight the British Empire, he reasoned, they must be treated as belligerents under international law. This claim in fact represented a challenge to the fundamental premise of existing international law. To understand its radical nature, a somewhat more detailed look at the historical relationship between international law and empire is required.

International law, as it developed in Europe from the sixteenth to the twentieth centuries, was guided by the imperatives of colonial conquest. As Anthony Anghie and other scholars have pointed out, the central question around which international law had evolved in Europe concerned the justice of colonial conquest and how European land-appropriation was to be regulated so as to prevent a perpetual state of war among major European colonial powers (Anghie 1996, 2005; Koskenniemi 2001; Tuck 2001). International law thus developed as the primary tool in the forging of a legal basis for the occupation and annexation of "native" lands and for the subjugation of indigenous peoples in the Americas and later in Asia and Africa. The sovereign territorial state in Europe was the central figure around which the conceptual elaboration of international law took place (Schmitt 2003; Anghie 1999). This order of states not only created clear territorial jurisdictions but also ended the European civil wars of religion. Thus was created the doctrine that the only "just wars" were those fought by sovereign European states, which recognized each other as equals and played by the same rules. Any other

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form of war was thus framed as a rebellion, mutiny, breach of the peace, or piracy under European international law.[19]

Over the previous three centuries, diplomatic conferences among European powers had been the primary vehicle for defining international law. Thus, collective agreements arrived at through such conferences—in 1648, 1814–1815, 1878, and 1885 (the Congo conference)—recognized all territorial changes in the world and the formation of new states (Fabry 2010). Successive conferences at Brussels in 1874, the Hague in 1899 and 1907, Geneva in 1924, and Paris in 1928 discussed the legality of war and the distinction between lawful and unlawful combatants. The only Asian power of note that found a seat among the European powers was Japan following its participation in the punitive expedition of the Great Powers against China in 1900 and its victory in the Russo-Japanese War of 1905 (Anand 2004, 59–65; Hershey 1906; Aydin 2007).

In the period following the First World War, international law became a particularly important part of the effort to maintain the status quo agreed to in Versailles (Schmitt 2003; Nussbaum 1954; Gross 1969; Fassbender and Peters 2012). The European empires that had emerged victorious in the First World War along with their ally the United States were to be the primary players and decisionmakers regarding international law, which would provide the basis for a system known as "collective security." Over the preceding two centuries, large parts of the population of Asia and Africa had fallen under the control of European empires through large-scale wars, annexation, and the making and breaking of what were often characterized by the colonized as deceitful treaties (e.g., Alexandrowicz 1955, 1967; Roling 1960; Anand 1972; Hershey 1906). Once this world order of empires had been consolidated, the colonized were declared to be part of various "protectorates," "dependencies," and "mandates" to be ruled for the near future by the imperial victors in the First World War. Any challenge to this imperial order thus contravened existing international law.

In the interwar period, the United States and Great Britain, as the two strongest states to emerge from the First World War, increasingly monopolized "legitimate" wars, labeling all others criminal and "aggressive." This distinction was, again, an essential part of the system of "collective security." Beginning with the attempt to try Kaiser Wilhelm of Germany in court for having started a criminal war, the notion of "aggressive war" began to take on increasing importance.[20] The Paris Peace Conference of 1919, the Kellogg-Briand of 1928, and the Stimson Doctrine of 1932 all emphasized

19. Balthazar Ayala (1912) and Alberico Gentili (1933) were two of the first writers to describe as "just" wars between sovereign states and other wars as illegitimate. See also Oppenheim 1920, 125–33, and Syatauw 1961.

20. During the Paris Peace Conference, the Allied leaders decided that the defeated enemy leaders should face criminal charges for their roles in starting the war. Accordingly, Articles 227–230 of the Treaty of Versailles called for the arrest and trial of Wilhelm II and other German officials as war criminals. The Leipzig War Crimes Trials, set up by the Treaty of Versailles, were the first attempt under international law to try leaders of defeated states for waging war. The President of the Paris Peace Conference sought the extradition of the erstwhile Kaiser from the Netherlands, but the Dutch refused, citing their neutrality. Eventually, the Allies dropped the idea of bringing the Kaiser to trial. Although the Leipzig War Crimes Trials were considered a failure at the time, they set a precedent for the Nuremberg and Tokyo Trials after the Second World War. See Mullins 1921.

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the difference between legitimate and aggressive wars, the latter being classified as international crimes (Schmitt 2003; Carnegie Endowment for International Peace 1919).[21] Indeed, with the Stimson Doctrine, the United States refused "recognition" to territorial changes anywhere in the world that were brought about by "aggressive" or "illegal" wars (Current 1954; Wright 1935). For imperial Britain, this conception of war was part of a larger effort to maintain the status quo in Asia and Africa.

Given that these agreements were in force during the interwar period among the most powerful states, Desai faced a formidable challenge in his claims about the INA. If any attempt at territorial change anywhere in the world could be termed an illegal war, then any anticolonial war initiated against a victorious colonial power was by definition "aggressive." Since the war started by the INA to end empire in India was clearly aimed at effecting territorial change, Desai could not claim that it was legitimate rather than aggressive under the terms of international law as it had been understood up to that time.

Desai's task at the trial thus amounted to no less than putting an end to the monopoly that imperial powers had claimed on legitimate war. That is, he had to challenge the conceptual foundations of international law anchored in imperial interests and to prove that the INA's armed opposition to the British Empire was not an aggressive insurgency but rather a legitimate war through which a new republican Indian state was asserting its freedom. In making this challenge, Desai was affirming India's entry as a separate and independent state into the community of states under international law by articulating a new conception of international law anchored, not in imperial interests, but in the equality of nations.

A key defense argument was thus that the INA had waged legitimate war because the fundamental rule of dominant international law—that a war prosecuted by a state in self-defense was legitimate—applied not just to imperial states but also to those that had been colonized. Approached this way, the INA's war had been legitimate because it had represented the state of India in exile, that is, the Indian Provisional Government in Singapore. The accused could not be treated as individual criminals because, again, the INA had waged not an insurgency, but a legitimate war on behalf of a state that was recognized by a significant part of the world community. As officers in the service of a state, then, the accused could not be tried as criminals under municipal law but rather had to be tried under international law and be granted the rights of belligerents (Oppenheim 1920, 134–39; Lauterpacht 1947).

Desai asserted that the Provisional Government of Free India that had been formed in 1943 under the leadership of Subhas Bose was not "a set of rebels, a desultory sort of crowd of no consequence" but rather an organized government to which more than two million people in East Asia owed allegiance (Desai 1954, 7). This new state already possessed territory (the islands of Nicobar and the Andamans that had been ceded to it by the Japanese government) and a fully functioning army with its own distinctive badges and emblems, duly appointed officers, and regulations (under the Indian National Army Act).

21. The Kellogg Briand Pact, described as a "General Treaty for Renunciation of War as an Instrument of National Policy," was signed initially by the United States, France, Germany, and, later, by other nations.

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The mere existence of the Provisional Government of India was, as Desai knew full well, insufficient to endow it with the status of a state under international law; it was only through recognition by other states—European states—that a new state joined the international community (Oppenheim 1920, 134–39; Lauterpacht 1947). Significantly, as Alexandrowicz (1958) argued, nineteenth-century positivists introduced the theory of recognition into international law. Before this development, the law of nations accepted existing states as legal entities in the international arena without reference to specific acts of recognition by the European powers. The shift can thus be seen as part of the effort to legitimize and maintain the territorial order established by European empires.[22] The idea of "civilization" was the rationale for denying Asian and African nations legal status equal to that claimed by European nations under international law in the nineteenth and twentieth centuries (Said 1979; Bowden 2005, 2009; Mehta 1999). As Oppenheim asserted in his classic text on international law:

> As the basis of the Law of Nations is the common consent of the civilized States, statehood alone does not imply membership of the Family of Nations . . . . For every state that is not already, but wants to be, a member, recognition is therefore necessary. A State is, and becomes an International Person, through recognition only and exclusively. (1920, 134)

So also for the international legal scholar Lorimer (1883), such recognition was the basis of European international law.

To demonstrate the legitimacy of the new state of India under international law, therefore, Desai pointed out that it had been recognized by the European powers Germany, Italy, and Croatia. Significantly, however, he went beyond existing international law by claiming that the legitimacy of the new state rested equally on its recognition by Asian states, including, as mentioned earlier, Burma, Thailand, Manchukuo, the Philippines, and "free" China. To the extent that the act of recognition was a privilege that European empires had arrogated to themselves over centuries and that it had thus determined the international legal order, the claim that recognition by Asian states could confer legitimacy was a radical discursive move that challenged the essential historical relationship between empire and international law. Thus Desai asserted that

> This recognition is proof . . . that it had the right to declare war for the purpose for which it was intended to fight, and having the right to declare war in so far as its armies were concerned, they became subject to the international laws of war . . . . Recognition is . . . a proof of . . . statehood, which gives it the capacity of declaring and making war for the liberation of its own countrymen. (1954, 7)

The defense's most critical task was to prove that the war fought by the INA against the British colonial state was defensive rather than aggressive in nature.

22. According to Alexandrowicz (1968, 126–27), the idea and practice of recognition as an essential part of international law was first formulated by Henry Wheaton in the third edition of his treatise of the Law of Nations. See Wheaton 1878, 17–18; Westlake 1914, 622; Philimore 1879–1889, 23–24.

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Traditionally under international law, however, wars fought by European empires in order to establish or maintain colonies had been considered just. The defense therefore had to transcend this vision of international law so as to claim a place for the peoples of Asia who rebelled against empire. The defense in the INA trial thus performed the historic task of according to anticolonial campaigns the status of legitimate defensive wars under international law.

Desai argued that colonial rule was an international wrong while war fought for the freedom of the colonized against imperial states was moral and just:

> There was at one time the old idea that you had to be an independent State or a sovereign State in order to be able to declare war. Of course that created a vicious circle, that a subject race will remain in perpetuity a subject race. It can never make a legitimate war for the purpose of liberating itself. . . . It is unnecessary in order to construct a war that both parties should be acknowledged as independent nations or sovereign States. (1954, 28)

The British Empire was now trapped by the discourse that it had itself created in the context of the League of Nations in advocating, along with other major European powers, the dismemberment of the empires defeated in the First World War. Thus, the British discourse on international law during the Second World War, which justified rebellion against the Axis Powers, was extended to the British Empire. "Who ventures to say," asked Desai, "that a member of the Dutch Army or for that matter the Polish or the French or the Yugoslavian Army may not fight to liberate their own country and not have the right to claim, even if they failed, all the rights and immunities . . . of belligerency?" (Ram 1946, 170). Since the legitimacy of law is based on the consistent application of principles, Desai called into question the British Empire's inherently contradictory application of international law. He accordingly asserted that "international law is not static" and that, in the case of the INA, "this war at all events was completely a justified war" (1954, 170). The accused in the present trial, as soldiers fighting on behalf of the legitimate state of India in exile, he affirmed, possessed the rights of belligerents under international law and therefore could not be tried as criminals under municipal law.

Desai was well aware that, because the League of Nations was dominated by the victors in the First World War, in particular the British Empire, there was no impartial authority willing to declare colonialism an international wrong and to recognize rebels against the Empire as belligerents under international law was lacking. Citing a statement by the renowned international legal scholar Henry Wheaton that "war in the absence of any international authority competent to suppress effectively international wrongs has always been held legal by international law," Desai contended that, because colonial rule was in fact an international wrong, the defensive war waged by the INA against the British King-Emperor was just and legal (Desai 1954, 25; Wheaton 1878, 98). It was the British Empire, from this perspective, that had fought "aggressive" wars of colonization, while the anticolonial war waged by the Indian state-in-exile was defensive and legitimate. Since no international authority was available that could decide against the British Empire, the subject people had no choice but to fight defensive wars of liberation (Desai 1954, 25–26).

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CONCLUSIONS

Judge-Advocate F. C. A Kerin recognized the radical nature of Desai's argument—that he was advancing a new approach to international law recognizing the right of the colonized to wage just wars. At the time, such a right had not been acknowledged by any existing work on international law. In summing up prosecution and defense arguments, Kerin offered his own view of the latter to the board of military officers who were to judge the accused: "A right to throw off their allegiance to the Crown has been claimed by defence under a so-called rule of International Law, which I must point out has not been substantiated by any authority on International Law" (Ram 1946, 277).

By contrast, Kerin asserted that the prosecution's argument was entirely consistent with existing international law. He characterized the "main contention of the prosecution" as being that "British Courts, and as a matter of fact British Indian Courts, are not entitled to look into International Law and administer justice on a question which is purely a domestic matter between a state and its subject" (Ram 1946, 272). Kerin contended that this rule governing British Indian courts was in complete conformance with existing international law, which gave broad discretion to the "parent state," in this case the British Empire, to deal with "insurgents" as it wished:

> It was apparent from quoted opinions of International jurists that in a conflict between a parent state and an insurgent body the internal relations between the two were a matter of discretion on the part of the parent state and no definite opinion based upon a rule of International Law had been expressed by any of them. (Ram 1946, 274)

This statement represented a clear acknowledgment on the Judge-Advocate's part that existing international law was in fact grounded in empire. British imperial law was itself a discourse on "supranational" justice that was consistent with the principles and practices of existing European international law, which was, again, rooted in the subjugation of the colonized.

The military officers of the British Indian Army sitting in judgment of the accused INA officers understood that the strategic imperatives of empire necessitated an unambiguous rejection of the defense's claim and a reassertion of the sovereignty of imperial justice centered on the figure of the King-Emperor on which British rule in India had been founded. The panel of what were referred to as "judges," consisting entirely of army officers without legal training—and who were therefore in no position to render judgment on an issue that required an understanding of the subtleties of international law—agreed with the prosecution and the Judge-Advocate in a closed session and decided against the accused. Army Commander-in-Chief General Auchinleck duly announced their decision.

The INA trial concluded with the British Military Court sentencing the defendants to exile for life (Ram 1946, 305). Recognizing that the judgment could not be enforced amid such intense public anger, Auchinleck issued an order commuting the sentences of the convicted and setting them free and recommended to the Viceroy that the charge of waging war against the King be dropped in future trials

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in what amounted to a clear recognition of the power of Desai's arguments (Connell 1959, 807–09). Those arguments had effectively demolished the legitimacy of the British monarch as "supranational impartial arbiter" in India after almost two centuries of protest by the colonized (M. Mukherjee 2010).

With disaffection to the point of mutiny breaking out across the Indian armed forces following the verdict, it became clear that the British could no longer take for granted the loyalty of the Indian soldiery. As Michael Edwards (1963) dramatically put it, "The ghost of Subhas Bose, like Hamlet's father, walked the battlements of the Red Fort, and his suddenly amplified figure over-awed the conferences that were to lead to independence" (93). Within two years, British rule of India came to a permanent end.

The INA trial took place at a time when the Eurocentric order of international law was foundering (Schmitt 2003, 39). The arguments made by the defense played a critical role in the resistance to the fundamental premises of international law, grounded as they were in European empires and the subordination of those they colonized. By exposing the limits of existing international law, the INA trial pointed in the direction of a new international law founded on the principle of equality for all nations in a post-imperial world.

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