

Dealing with Desertion and Gaps in International Humanitarian Law: Changes of Allegiance in the Singapore War Crimes Trials

CHEAH W.L.*

National University of Singapore, Singapore

lawcwl@nus.edu.sg

Abstract

By studying British Indian Army [BIA] desertions during World War II, and British postwar trial responses, this paper explores the complicated dimensions of desertion and draws attention to the need for a more explicit and comprehensive approach to desertion in international humanitarian law. The paper focuses on less known British trials dealing with desertion, namely, war crimes trials conducted by the British in Singapore. It examines how these trials dealt with contested interpretations of desertion. Drawing on lessons from these trials, the paper then highlights gaps in today's international humanitarian law framework, specifically, the need to take into account the realities of desertion, its different permutations, and the difficulties of differentiating between prisoners of war [POWs] and deserters.

I. BRITISH INDIAN ARMY DESERTIONS: HISTORY AND CONTEMPORARY RELEVANCE

Two days after the fall of Singapore to Japan in World War II [WWII], the Japanese military assembled 45,000 Indian soldiers from the British Indian Army [BIA] at Singapore's Farrer Park, a sports field named after the British Municipal Assessor R.J. Farrer.¹ Crowds of Indian soldiers gathered before a stage and listened to fiery Indian and Japanese speakers who called on them to join the newly formed Indian National Army [INA] and fight the British for India's independence. Many Indian soldiers decided to join the INA and take up arms against the British, for whom they had earlier fought.²

* Assistant Professor, Faculty of Law, National University of Singapore.

1. Peter Ward FAY, *The Forgotten Army: India's Armed Struggle for Independence 1942–1945*, 1st ed. (Ann Arbor: University of Michigan Press, 1994) at 78. The Indians heard speeches from key figures central to the Indian National Army's [INA's] formation: Major Fujiwara Iwaichi, head of the Japanese intelligence unit responsible for encouraging anti-British local movements; Mohan Singh, who was the head of the new INA; and Pritam Singh, a representative of the Indian Independence League. Joyce Chapman LEBRA, *The Indian National Army and Japan* (Singapore: Institute of Southeast Asian Studies, 2008) at 37–8.

2. It should be noted that contrary to popular myth, and as explained later in this paper, not all Indian soldiers joined the INA for nationalistic reasons, and there were also a substantial number who chose not to join the INA.

After the war, the British conducted hundreds of war crimes trials and treason trials in Asia, some of which addressed BIA desertions. The most well known of these trials took place in India, where the British court-martialled INA members in trials also known as the “Red Fort Trials”.³ BIA desertions were also discussed in other British postwar trials. In this paper, I focus on desertion-related discussions in war crimes trials held by the British in Singapore. The Indian victims in these trials were former BIA personnel who had been abused by the Japanese accused. At these trials, the accused argued that the Indian victims had deserted the British military to join the Japanese military and were in fact treated as other members of the Japanese military. In contrast, the British prosecution portrayed the victims as loyal British Indian soldiers captured and abused by the Japanese military. As members of the British military, British judges in these trials were possibly aware of the negative message sent if these Indian victims were found to be genuine deserters. Nevertheless, British trial personnel were also aware of the need to ensure that these trials came across as fair and even-handed in their treatment of the accused. This paper addresses two main questions: How did these British military courts deal with contested interpretations of desertion and the Indian victims’ status? And how do these trials highlight gaps in international humanitarian law when it comes to desertion?

The issues raised in these trials highlight the complicated nature of desertion. Many of these issues remain unresolved today. Part II explains the continued relevance of desertion in armed conflict today,⁴ and introduces the reader to BIA desertions as a historical case-study. Part III goes on to examine war crimes trials held by the British in Singapore that dealt with questions of BIA desertions. The paper focuses on two trials that engaged, at length, with the legal consequences of desertion, namely, *Ikegami Tomoyuki and others* and *Takashima Shotaro and another*.⁵ I examine how these trials dealt with contested interpretations of desertion and the victims’ prisoner of war

-
3. For a historical and legal analysis of the Red Fort Trials, see L.C. GREEN, “The Indian National Army Trials” (1948) 11 *Modern Law Review* 47.
 4. In their interesting empirical study of defection, Oppenheim *et al.* highlight how governments and paramilitaries continue to use desertion or defection in conflicts with insurgents for three reasons: to decrease the number of active combatants; to “score political points” against their opponents; and to obtain information on “insurgent tactics and strategy”. Ben OPPENHEIM, Abbey STEELE, Juan F. VARGAS, and Michael WEINTRAUB, “True Believers, Deserters, and Traitors: Who Leaves Insurgent Groups and Why” (2015) 59 *Journal of Conflict Resolution* 794 at 797.
 5. The original records of the trials and other British military records referred to in this paper are housed at the National Archives of the UK (hereinafter “TNA”). The record group is “WO 235—Judge Advocate General’s Office: War Crimes Case Files, Second World War”. The National University of Singapore also holds copies of trial transcripts. When relevant documents are available in the International Criminal Court’s Legal Tools Database, reference links will be provided. The two main trials cited in this paper are categorized in the UK National Archives as follows: “WO235/979—Defendant Ikegami Tomoyuki, Place of Trial Singapore”; “WO235/974—Defendant Takashima Shotaro, Place of Trial Singapore”. The trials will hereinafter be referred to as *Ikegami Tomoyuki and others* and *Takashima Shotaro and another*. Note that the name of the first accused in *Takashima Shotaro and another* is represented in the UK National Archives citation as “Takashima Shoiaro”, but the documents in the file represent his name as “Takashima Shotaro”. The TNA staff have entered sequential pagination onto the documents, many which do not have original page numbers. This pagination appears on copies held by the National University of Singapore’s Central Library. In this paper, I use this pagination as reference by putting a prefix “SP” before the number.

[POW] status. Part IV and Part V then situate the issues raised in these trials against more contemporary international humanitarian law debates. It argues that international law needs to adopt a more explicit and detailed approach to desertion.

II. DESERTIONS AND INTERNATIONAL HUMANITARIAN LAW: THE BIA AS A CASE-STUDY

Even in times of peace, militaries usually treat desertion as a serious offence. Most military codes provide for the punishment of desertion.⁶ Deserters undermine the morale of other military personnel who may end up having to take on the deserter's responsibilities.⁷ In times of conflict, deserters pose an even higher risk to military operations. Deserters may jeopardize military operations by giving away security and intelligence information to the opposing side. Deserters may be able to provide the enemy with important information about the other side's strategies and weaknesses. Those who switch sides add to the fighting resources of one side while diminishing that of their original armed forces. This explains why militaries and armed groups vigilantly police desertion among their ranks. Indeed, some have argued in the past that the receipt and harbouring of deserters during an armistice may amount to an "implied act of hostility".⁸

This paper will use "desertion" to refer to all those who have voluntarily abandoned their forces on a permanent basis.⁹ This includes those who have abandoned their forces to join the other side in various capacities, which was the case for BIA desertions. Some commentators have used the term "defection" to refer to such side-switching cases.¹⁰ Distinguishing between those who merely abandon their forces and those who abandon their forces while subsequently bearing arms for the enemy is important because the former may not want to sever their allegiance with the country under which they previously served. Deserters may desert for many reasons. Not all may wish to sever their prior allegiance.

6. In the UK, for example, sentences for desertion are "usually custodial" and "designed to deter absentees". Jeff BLACKETT, *Rant on the Court Martial and Service Law*, 3rd ed. (Oxford: Oxford University Press, 2010) at 178.

7. *Ibid.*

8. See UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2005) at 265.

9. Present-day legal commentators continue to debate the definition of desertion. Some commentators focus on the voluntariness of a deserter's abandoning his force. Others require the deserter to display or act on an intention to sever allegiance with the country of his force. Esgain and Solf distinguish between a deserter who "voluntarily abandons his force to avoid combat or for some other purpose", and a deserter who voluntarily abandons his force "for the purpose of bearing arms on behalf of the Detaining Power to otherwise participate in military operations of the Detaining Power" or "who at the time of his capture and surrender, makes known his previously formulated and present intent to bear arms on behalf of the Detaining Power or otherwise actively participate the military operations of the Detaining Power": Albert J. ESGAIN and Waldemar A. SOLF, "The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies" (1962) 41 North Carolina Law Review 537 at 555.

10. Marco SASSÒLI, "The Status, Treatment and Repatriation of Deserters Under International Humanitarian Law" (1985) Yearbook of the International Institute of Humanitarian Law 9 at 17.

A. *Desertion: Its Continued Relevance and (Non)Regulation*

Despite international humanitarian law's growth over the past decades, none of its treaties or instruments expressly addresses desertion or the different facets of desertion. Indeed, the term "desertion" is not used or defined in any of these documents. Also, compared with other conflict-related issues, desertion seems to have attracted relatively less attention from commentators. Desertion is neither rare nor uncommon in times of armed conflict. This was the case in both World War I [WWI] and WWII, and was to be expected, given the natural inclinations of the ordinary fighter involved in those world wars.¹¹ Despite this, James Clause noted in 1961 that the lack of international legal scholarship on desertion may be due to the "fact that few controversial problems have been generated in the past".¹²

Military strategists and scholars observe that wars are won not through the number of most killed but the loss of fighting members, which can take place through desertion.¹³ Niall Ferguson argues that, based on this rationale, one should pursue the surrender of one's enemies in war.¹⁴ The same rationale would also call for the encouragement of enemy desertion if one is seeking to end or de-escalate conflicts. Desertion may also become of increasing interest given the nature of contemporary conflicts. In a 1985 paper, Sassòli observed that desertion has "taken on increased importance in recent years" as conflicts are increasingly perceived as ideologically driven, and as opposing sides to a conflict try to convert combatants to their ideology.¹⁵ The use of militia or economically motivated fighters also impacts desertion.¹⁶ Research in political science and sociology has sought to explain why fighters switch sides or stop fighting.¹⁷ Despite the continuing relevance of desertion in modern-day conflict, and its strategic consequences, none of today's main international humanitarian law instruments expressly address desertion.

Existing international humanitarian law instruments do not directly regulate desertion. During WWII, the few international agreements that then applied did not deal with deserters.¹⁸ The postwar 1949 Third Geneva Convention relative to the Treatment of Prisoners of War¹⁹ (hereinafter "the Third Geneva Convention") also does not refer to

-
11. Niall FERGUSON, "Prisoner Taking and Prisoner Killing in the Age of Total War: Towards a Political Economy of Military Defeat" (2004) 11 *War in History* 148 at 152.
 12. James D. CLAUSE, "The Status of Deserters Under the 1949 Geneva Prisoner of War Convention" (1961) 11 *Military Law Review* 15 at 17.
 13. Ferguson, *supra* note 11 at 149–51.
 14. *Ibid.*, at 151.
 15. Sassòli, *supra* note 10 at 10.
 16. Oppenheim *et al.*, *supra* note 4 at 3.
 17. *Ibid.*
 18. *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907 (entered into force 26 January 1910), online: ICRC <<https://ihl-databases.icrc.org/ihl/INTRO/195>> [1907 *Hague Convention and Regulations*]. *Geneva Convention Relative to the Treatment of Prisoners of War*, 27 July 1929 (not yet in force), online: ICRC <<https://ihl-databases.icrc.org/ihl/INTRO/305>> [1929 *Geneva Convention*]. Japan had ratified the 1907 Hague Convention and Regulations. Japan had signed but not ratified the 1929 Geneva Convention but stated that it would apply the Convention on a *mutatis mutandis* basis during the war.
 19. *Convention (III) relative to the Treatment of Prisoners of War*, 12 August 1949 (entered into force 21 October 1950), online: ICRC <<https://ihl-databases.icrc.org/ihl/INTRO/375>> [1949 *Third Geneva Convention*].

desertion. However, through their regulation of POW status, these instruments do impact the status and protection of certain deserters who acquire POW status. Deserters recognized as POWs have a detailed set of rights and cannot be enlisted in the armed forces that they “deserted” to. In other words, even if the deserter wishes to serve in the armed forces that he deserts to, the said armed forces will be prohibited from accepting this deserter’s offer if the deserter is recognized as a POW. Whether and when a deserter obtains POW status thus becomes important. Apart from setting out the rights and obligations of POWs, the Third Geneva Convention also states when an individual obtains or loses POW status.²⁰ As explained below, by addressing when POW status is obtained, the Third Geneva Convention also decides when and whether deserters can fight on behalf of the armed forces they deserted to. It should be noted that the Third Geneva Convention only applies to international armed conflicts, and there is also need for international instruments to address desertion in non-international armed conflicts.²¹

B. BIA Desertions as a Historical Case-Study

The popular story of BIA desertions in WWII speaks of British Indian soldiers deserting the British military in droves when called upon to do so. Historians have criticized this narrative of BIA desertions, arguing that it fails to recognize the diverse response of BIA personnel or the fact that many deserted under coercion.²² To get a better understanding of BIA mass desertions in Singapore, it is necessary to go further back in time.

Prior to Japan’s attack on Malaya, the Japanese military established F Kikan, a military intelligence unit headed by Major Fujiwara Iwaichi.²³ This unit was responsible for making contact with local groups, such as the Indian Independence League [IIL], and obtaining their support for Japan against the British. Throughout the war, the Japanese threw their support behind a number of anti-colonial pro-independence movements in the region.²⁴ When Japan invaded Malaya on 8 December 1941, Fujiwara and F Kikan accompanied the Japanese military on its march down the Malay Peninsula, reaching out to BIA soldiers captured by the Japanese military. Captain Mohan Singh was one of the earliest soldiers approached by Fujiwara.²⁵ Singh was captured by the Japanese military early on in Japan’s attack of Malaya, and Fujiwara successfully persuaded Singh to form an army composed of BIA deserters who would then fight the British for India’s independence.²⁶

Fujiwara and Mohan Singh’s men followed the Japanese military in their lightning attack down the Malay Peninsula.²⁷ Along the way, they persuaded abandoned or

20. 1949 *Third Geneva Convention*, *ibid.*, at art. 4.

21. This paper confines itself to discussing international armed conflicts.

22. Kevin BLACKBURN and Karl HACK, *War Memory and the Making of Modern Malaysia and Singapore* (Singapore: NUS Press, 2012) at 177.

23. Fay, *supra* note 1 at 74.

24. See generally Joyce Chapman LEBRA, *Japanese-Trained Armies in Southeast Asia* (New York: Columbia University Press, 1977).

25. Fay, *supra* note 1 at 74.

26. *Ibid.*, at 75.

27. *Ibid.*

surrendered BIA members to join them. They headed to Singapore, and on 15 February 1942, Singapore fell to Japan when the Japanese military inflicted a crushing defeat on the British military. Two days after the fall of Singapore, the Japanese military separated Indian soldiers from other British troops and brought the former to Singapore's Farrer Park.²⁸ There, Fujiwara and Mohan Singh urged the gathered Indian soldiers to renounce their allegiance to the British and join the INA. According to Singh, who spoke at Farrer Park as the head of the new INA, the crowd responded with euphoric cheers and enthusiasm to his call to fight the British: "There was a spontaneous response from all the soldiers. Along with the raising of hands, thousands of turbans and caps were hurled up in the air ... soldiers jumped to their feet ... with prolonged shouts of '*Inqilab Zindabad*' (Long Live Revolution)."²⁹

According to Alan Warren, out of the 55,000 Indian soldiers captured by the Japanese military in 1941, 20,000 decided to join the INA when called on to do so, with another 20,000 doing so from June to August 1942.³⁰ The INA was thus officially born. When other British military personnel in Singapore heard about the Indian soldiers' change of allegiance, many saw it as a betrayal and reacted in shock and disappointment.³¹ There were in fact many reasons why Indian soldiers chose to switch their allegiance. Some truly did believe Japan's promise to liberate Asia from the shackles of Western colonial rule.³² Others were disillusioned and angry at the British military's racially discriminatory practices.³³ Lower-ranking soldiers often followed the decisions of their Indian officers.³⁴ It should be noted that not all captured Indian soldiers joined the INA. Many Indian soldiers also ended up as forced labour in the hands of the Japanese military and suffered great hardship.³⁵

The fortunes of these Indian soldiers ebbed and flowed throughout the war. The relationship between the INA and the Japanese military was often fraught. In 1942, Mohan Singh fell out with the Japanese military leadership and was imprisoned.³⁶ The next year, the charismatic Subhas Chandra Bose arrived in Singapore to take up leadership of the INA.³⁷ Bose's formation of the Provisional Government of Free India in Singapore inspired many more Indians to join the INA. Another 10,000 captured

-
28. Alan WARREN, *Singapore 1942: Britain's Greatest Defeat* (London: Hambledon and London, 2002) at 274.
29. Mohan SINGH, *Soldiers' Contribution to Indian Independence* (New Delhi: Army Educational Stores, 1974) at 109.
30. Warren, *supra* note 28 at 275.
31. *Ibid.*, at 276.
32. *Ibid.*, at 274–5.
33. *Ibid.*, at 275.
34. *Ibid.*
35. G.J. DOUDS, "Indian POWs in the Pacific, 1941–1945" in Kevin BLACKBURN and Karl HACK, eds., *Forgotten Captives in Japanese-Occupied Asia: National Memories and Forgotten Captivities* (Oxford: Routledge, 2008), 73 at 80.
36. Warren, *supra* note 28, at 276. For example, the INA leadership wanted Indian POWs to be considered INA reserve units and be trained by the INA. The Japanese, however, wanted these POWs to form labour units under Mohan Singh's command and work in co-operation with the Japanese military. Lebra, *supra* note 1 at 83.
37. Warren, *supra* note 28 at 276.

Indian soldiers joined the INA.³⁸ By 1945, 18,000 Indian civilians had also joined the INA.³⁹

III. DEBATING BIA DESERTIONS IN THE SINGAPORE TRIALS

At the end of the war, the British conducted a variety of trials across Asia.⁴⁰ There were trials for war crimes as well as trials for treason and collaboration. The former targeted Japanese military personnel and those associated with the Japanese military, while the latter targeted British subjects, including Indian soldiers who had served in the BIA but who later joined the INA to fight the British. Questions about the nature of BIA desertions came up in both types of trials.

In India, the British started prosecuting captured INA personnel in courts martial trials even before the war came to an end. About ten trials were held.⁴¹ The earlier trials, held from 1943 to 1944, seem to have been uncontroversial.⁴² However, those held after Japan's surrender attracted much political controversy and public opposition. In the first of these postwar trials, also popularly known as the "Red Fort Trials", three senior INA officers were charged. Major General Shah Nawaz, Major General Prem Kumar Sahgal, and Colonel Singh Dhillon were accused of waging war against the King under Section 121 of the Indian Penal Code, murder, and abetment of murder.⁴³ In responding to the first charge of treason, the defence argued that the defendants did not do anything wrong because the Provisional State of India was a sovereign state that had the right to declare war against the British, and the INA was the legitimate army of this state.⁴⁴ Accordingly, the defendants were fighting on behalf of the Provisional State and should not be subject to municipal law.⁴⁵ These arguments were rejected by the courts, and the defendants were convicted for treason and sentenced to cashiering, forfeiture of pay and allowances, and transportation for life. To the defendants' own surprise, their sentence was immediately remitted and they walked free.⁴⁶ These trials of INA personnel have been subject to various scholarly studies, so I offer only a summary of the trials here. My focus in this paper will be on British war crimes trials in Singapore that discussed the question of BIA desertions.

38. Alan WARREN, "The Indian Army and the Fall of Singapore" in Brian FARRELL and Sandy HUNTER, eds., *Sixty Years On: The Fall of Singapore Revisited* (Singapore: Eastern Universities Press, 2002), 270 at 286.

39. *Ibid.*

40. The British also conducted war crimes trials in Europe. This was similarly the case for all Allied Powers. In addition, the Allies jointly organized the Nuremberg Trial and the Tokyo Trial. For an overview of Allied war crimes trials in Asia, see Philip R. PICCIGALLO, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951* (Texas: University of Texas Press, 1975). For a recently published overview of select trials, see Yuma TOTANI, *Justice in Asia and the Pacific Region, 1945–1952* (Cambridge: Cambridge University Press, 2015).

41. Fay, *supra* note 1 at 497.

42. Green, *supra* note 3 at 48.

43. Fay, *supra* note 1 at 476; Green, *supra* note 3 at 52.

44. Green, *supra* note 3 at 55–6.

45. *Ibid.*, at 56.

46. Fay, *supra* note 1 at 493.

A. Contestations of POW Status in the Singapore Trials

Questions about BIA desertions also arose in war crimes trials conducted by the British after the war. As background, at the end of WWII, the British and other Allied Powers individually conducted war crimes trials in Asia and Europe. In Asia, the bulk of British war crimes trials were conducted in Singapore, as the island served as a base for British war crimes investigations.⁴⁷ These British war crimes trials were conducted pursuant to a Royal Warrant, passed on 18 June 1945 by the British executive, that authorized the British military to establish military courts to try violations of “the laws and usages of war”.⁴⁸ British or Allied judges presided over these war crimes trials; the prosecutors were usually from the British military; and the majority of defendants were represented by Japanese defence counsel assisted by British defence advisory officers.⁴⁹ Trial findings of guilt were subject to “confirmation” by a confirming officer from the British military.⁵⁰ Those convicted at trial had the right to submit petitions for the confirming officer’s examination.⁵¹ For the Singapore Trials, the Department of the Judge Advocate General [JAG] in Singapore would prepare a report at the confirmation stage which summarized the factual and legal arguments of the case, and this report would be considered by the confirming officer when making his decision.

In several Singapore trials dealing with war crimes committed against BIA Indian victims, the defence argued that these Indian victims had renounced their British allegiance and were, at the time of the crime, members of the Japanese military.⁵² It was alleged that these Indian victims had been given the same treatment as Japanese soldiers and, due to the victims’ status, the crimes charged did not amount to war crimes. Not all trials involving Indian victims featured such legal discussions.

47. The British held altogether 131 trials in Singapore. The trials were held in various locations across Singapore, such as at the Singapore Supreme Court, Victoria Memorial Hall, and Changi Prison.

48. International Criminal Court, “Royal Warrant 0160/2498—Regulations for the Trial of War Criminals” (18 June 1945), online: ICC <<http://www.legal-tools.org/doc/386f77/>> [1945 Royal Warrant and Regulations]. In Asia, British war crimes trials were also governed by an army instruction issued by the British military operating in this area, namely, Allied Land Forces, South-East Asia [ALFSEA]. Note that ALFSEA was reorganized from 1 December 1946 into South-East Asia Land Forces (SEALF). The TNA record group is “WO 203/6092—War Crimes Instruction No. 1 (2nd ed.)” [ALFSEA Instruction No. 1].

49. 1945 Royal Warrant and Regulations, *supra* note 48 at art. 5. The courts did not issue comprehensive judgments with their findings. Legal issues were raised during trial proceedings and in the opening and closing statements of the prosecution and the defence, though the quantity of legal discussion in these trials was generally lower than that in contemporary war crimes trials.

50. 1945 Royal Warrant and Regulations, *supra* note 48 at art. 11.

51. *Ibid.*, at art. 10.

52. In addition to the two trials considered in this paper, namely, *Ikegami Tomoyuki and others* and *Takashima Shotaro and another*, questions about the Indian victims’ status were raised in the following trials, though there were no detailed legal discussions: *Gozawa Sadaichi and others*, WO 235/813, TNA [*Gozawa Sadaichi and others*]; *Okamura [Ckamura] Hideo*, WO 235/820, TNA [*Okamura Hideo*]; *Kondo Takeyoshi*, WO 235/950, TNA [*Kondo Takeyoshi*]; *Takahashi Kohei and another*, WO 235/960, TNA [*Takahashi Kohei and another*]. In *Kondo Takeyoshi*, the court decided that the prosecutor had provided sufficient evidence that the victims were POWs, SP 00019. In *Takahashi Kohei and another*, the Department of the JAG review report took note of defence counsel’s argument that the accused had believed that the victims were “labourers” rather than POWs, but did not discuss the implications of this, SP 00004. The full citation information of these trials at the TNA are as follows: “WO 235/813—Defendant Gozawa Sadaichi, Place of Trial Singapore”; “WO 235/820—Defendant Ckamura Hideo, Place of Trial Singapore”; “WO 235/950—Defendant Kondo Takeyoshi, Place of Trial Singapore”; and “WO 235/960—Defendant Takahashi Kohei, Place of Trial Singapore”.

It was only in two cases, discussed in this paper, that the court heard detailed legal arguments on the contested nature of BIA desertions and the victims' status.⁵³ These two Singapore trials—*Ikegami Tomoyuki and others* and *Takashima Shotaro and another*—featured interesting if different legal discussions at their trial and post-trial stages.

The trial of *Ikegami Tomoyuki and others* started on 19 November 1946 and ended on 2 December 1946.⁵⁴ All six defendants belonged to the Ikegami Unit headed by the first accused, Ikegami Tomoyuki. Two charges were brought against the defendants based on two separate incidents dated 27 June 1945 and 18 June 1945. The facts of the case were as follows. The first accused Ikegami was the commander of a unit which included the “Romu Tai”, also referred to by trial actors as “Special Labour Force”, “Special Labour Unit”, or “Special Labour Corps”. For consistency, this paper will use the term “Special Labour Force”. The Indian victims were argued by the defence to belong to this Force. At the time of these crimes, the Ikegami Unit was operating in Lutong in the Malaysian state of Sarawak. The second, third, fourth, and fifth accused—Takahashi Yoichi, Takahashi Tatsuo, Miyoshi Ren, and Hisano Jun—were technical officers working on the Lutong oilfield. Takahashi Takeshi, the last accused, was a quartermaster working on the Lutong oilfield. The first accused held the rank of major, the second and third accused were first lieutenants, the fourth and fifth accused were second lieutenants, and the sixth accused was a corporal.

On 18 June 1945, during the unit's withdrawal from the area while under Allied attack, Ikegami received a report that five Indians from the Romu Tai had been arrested while attempting to escape. It was claimed that the Indians had with them a secret map that showed the locations of Japanese units. Upon investigating, Ikegami concluded that they were Romu Tai members conspiring to desert to the enemy with secret information. Ikegami then ordered the victims' execution, and the victims were executed later that day.

On 26 June 1945, eleven more Romu Tai members escaped but were recaptured on the same day. The second accused Takahashi reported this incident to Ikegami, explaining, among other things, that secret documents had been lost and found. Ikegami then conducted investigations and found that the victims had planned to desert and had stolen confidential documents. He decided the victims were to be executed. The next day, on 27 June 1945, the five other accused reported to Ikegami who explained his execution order and its grounds to these accused. The said Romu Tai members were then executed by the defendants that morning. The first charge, relating to the killing on 27 June 1945, was brought against all accused. The second charge, relating to 18 June 1945, was brought only against Ikegami.

53. When assessing the level of legal argument in the Singapore Trials, it is important to note that the law on armed conflict remained relatively undeveloped in the immediate postwar period. In addition, the majority of trial personnel involved in the Singapore Trials did not hold formal legal qualifications. The British military faced a general shortage of legally qualified personnel when organizing these trials. These courts also did not elaborate on the reasons for their decisions, though it is possible, by reading the transcript carefully, to identify reasons for certain decisions, as demonstrated in this paper in the cases of *Ikegami Tomoyuki and others* and *Takashima Shotaro and another*. To get a more comprehensive idea of how these BIA desertions were treated in British Royal Warrant war crimes trials, it is necessary to consider a larger number of trials, including those conducted elsewhere in Asia. By highlighting desertion-related discussions in select Singapore trials, this paper hopes to serve as a springboard for further studies.

54. *Ikegami Tomoyuki and others*, *supra* note 5.

There were three judges assigned to the case: Lieutenant Colonel H.E.R. Smith, Major E.N. Hebden, and Captain E.H. Dunsford.⁵⁵ The prosecutor was Major S.J. Smith, who was a solicitor.⁵⁶ The accused were defended by Japanese defence counsel Tatsuzaki Ei, who was a judge advocate from the Imperial Japanese Navy.⁵⁷ A British defence advisory officer, Lieutenant J.H. Ward, was assigned to assist the defence.⁵⁸ Altogether, the trial lasted seven days. The first accused Ikegami was sentenced to death by hanging. The second, third, fourth, and fifth accused were sentenced to ten years' imprisonment each. The sixth accused was sentenced to five years' imprisonment. The court's sentences were nevertheless not confirmed at the post-trial stage for reasons explained further below.

The second case discussed in this paper is *Takashima Shotaro and another*, which was decided by the same panel of judges and which also discussed questions of allegiance. This trial started on 25 January 1947 and ended on 30 January 1947.⁵⁹ This trial involved two accused, Takashima Shotaro and Asako Koichi. Both were charged with the ill-treatment of Indian POWs in a camp run by the two accused in Sankakuyama, New Britain. Takashima was a sergeant and in charge of the party of Indian POWs, while Asako was a corporal and a medical orderly in the camp. The prosecutor in that case was Major Sahay.⁶⁰ The defence lawyer was Nakamura Takeshi, recorded as a barrister at the Tokyo Civil Court.⁶¹ The defence advisory officer was Captain D.F.H. Sinclair.⁶² The trial was conducted over six days. Two witnesses testified for the prosecution, and three individuals testified for the defence, including the second accused Asako. At the close of the prosecution's case, defence counsel argued that the prosecution had not provided enough evidence or made out a case to answer against Takashima.⁶³ The court agreed with defence counsel and acquitted Takashima. The trial then continued, and Asako was eventually sentenced to life imprisonment. The court's finding and sentence against Asako was, however, not confirmed.

The position of the Indian victims in these two cases differed slightly. In *Ikegami Tomoyuki and others*, the Indian victims had allegedly sworn allegiance to the Japanese after being captured by the Japanese military. They were then caught trying to desert the Japanese military. In *Takashima Shotaro and another*, the Indian victims were subject to abuse and harsh treatment while under the command of the Japanese military. In both cases, the defence argued that the Indian victims were in fact members of the Japanese military. Specifically, these Indian victims were members of the Japanese Romu Tai or Special Labour Force. These cases were decided by the same panel of judges.

55. "Military Court for the Trial of War Criminals", *ibid.*, at SP 0003.

56. "Proceedings of a Military Court", *ibid.*, at SP 00019

57. *Ibid.*

58. *Ibid.*

59. "Proceedings of a Military Court", *Takashima Shotaro and another*, *supra* note 5 at SP 0004.

60. *Ibid.*, at SP 00014.

61. *Ibid.*

62. *Ibid.*

63. *Ibid.*, at SP 00036–7.

B. Trial Findings: Side-Switching as Legally Impermissible

In *Ikegami Tomoyuki and others*, the court started having doubts about the victims' POW status based on facts raised by witnesses at the trial. In his opening address, defence counsel pointed out that the Indian victims were all "members of the Tokushu Romutai" who had "voluntarily sworn an oath of allegiance to the Japanese".⁶⁴ On 25 November 1946, when the court questioned the accused Miyoshi Ren on the nature of the unit, the latter explained that he had been "ordered and instructed by my superior officer" that the unit comprised "Indians who had sworn loyalty to the Japanese".⁶⁵ Miyoshi went on to explain that he always saw the Indians "being treated the same way as Japanese soldiers".⁶⁶ They had their own commander, who was selected from among them. There were Japanese officers employed in the unit for "liaison purposes", and who were to "lead" and "instruct" the Indians as the Indians "did not know Japanese customs and manners".⁶⁷ The court also addressed the issue of allegiance during its questioning of the accused Takahashi Tatsuo. Takahashi explained that part of the job undertaken by the Special Labour Force was the "guarding of the oil fields".⁶⁸ The court asked Takahashi whether the Indian POWs had their own commanding officer and "a reasonable amount of freedom" within the area that their camp was located. Takahashi answered in the affirmative to both questions.⁶⁹

The Special Labour Force's organization, its relatively important job, and its members' unregulated movements raised concerns about the court's jurisdiction over the crime committed against this unit's members. The court highlighted its concerns to the prosecutor, noting that there was "a certain amount of corroborated evidence" that the victims were not POWs but "persons of Indian birth formerly subjects of His Majesty the King" who "by oath of greater weight than a parole made to the Japanese authorities", "renounced their rights as British subjects".⁷⁰ The court asked the prosecutor to consider this issue and submit his advice to the court, adjourning until the next day.⁷¹

On 26 November 1946, when the court reassembled, it heard the prosecutor's arguments on the allegiance issue. In the course of his arguments, the prosecutor referred to a mixture of British law and international law. He argued that any divesting of nationality should be governed by the 1914 British Nationality and Status of Aliens Act and existing British case-law, according to which a British national can only divest himself of nationality during war in favour of an enemy state when residing in that state.⁷² Furthermore, based on British case-law, the prosecutor argued that as an individual cannot avoid the "military obligations" that arose before the renouncement

64. "Opening Address by the Defence Counsel", *ibid.*, at SP 00099.

65. Testimony of Miyoshi Ren, *ibid.*, at SP 00042.

66. *Ibid.*

67. *Ibid.*

68. Testimony of Takahashi Tatsuo, *ibid.*, at SP 00046.

69. *Ibid.*

70. *Ibid.*, at SP 00047.

71. *Ibid.*

72. Prosecution's submission on oaths of allegiance, *ibid.*, at SP 00049.

of nationality; he also cannot avoid the “privileges and benefits” of those undertaking such military obligations, including that accorded under international treaties.⁷³ More interestingly, the prosecution argued that there were two classes of rights in law: those granted “for the protection of the Public at large” and those “solely for individual protection”. The prosecution argued that protections guaranteed by international conventions fell within the category of rights that could not be renounced. Any renunciation by individuals would be “contrary to public policy” because it “would weaken the effect of the Conventions generally” and as such would be “null and void”.⁷⁴

After hearing the arguments of the defence, the court adjourned for fifteen minutes to consider the submissions of the prosecution and the defence. Upon reconvening, the court explained its opinion that it was not “empowered” to decide on its jurisdiction over the accused and would adjourn to consult the convening authority.⁷⁵ When the court met again on 28 November 1946, it announced that it had considered counsels’ submission and the input of legal advisors from the convening authority. Based on “International Law and the Constitutional Laws of the Empire”, the court held that subjects were unable to renounce their allegiance during a state of war. Indeed, the court noted that “seduction of the captive for his allegiance” by a captor would be a war crime.⁷⁶ Based on the court’s finding that any renunciation of allegiance was legally impermissible, the court continued with the trial.

A slightly different argument was attempted by the prosecution in the later case of *Takashima Shotaro and another*. On the trial’s fourth day, 29 January 1947, defence counsel submitted that the Indian victims had taken an oath of allegiance to the Japanese military and were no longer POWs at the time of the alleged crime. The war crime was therefore not within the court’s jurisdiction.⁷⁷ The prosecution sought to cut off defence counsel’s argument by referring to Regulation 6 of the 1945 Royal Warrant and Regulations. This regulation prohibited jurisdictional challenges.⁷⁸ The prosecutor stated that Regulation 6 provided a “complete answer” to the claims made by the defence.⁷⁹ He further argued that the British Manual on Military Law prohibited occupying forces from forcing inhabitants of occupied territories from swearing allegiance to the former. If this was so for the civilian population, the prosecutor argued that POWs “certainly cannot” change allegiance.⁸⁰

The court did not foreclose consideration of the allegiance issue based on Regulation 6, but the route chosen was no less satisfying. The court president explained that the present court had been involved in an earlier trial where “an identical submission” had been made

73. *Ibid.*

74. *Ibid.*, at SP 00050.

75. *Ibid.*

76. *Ibid.*, at SP 00052.

77. *Takashima Shotaro and another*, *supra* note 5 at SP 00054.

78. *Ibid.* Regulation 6 appended to the 1945 Royal Warrant stated that an “accused shall not be entitled to object to the President or any member of the Court or the Judge Advocate or to offer any special plea to the jurisdiction of the Court”.

79. *Takashima Shotaro and another*, *supra* note 5 at SP 00055.

80. *Ibid.*, at SP 00054.

by the defence.⁸¹ He was in all probability referring to *Ikegami Tomoyuki and others*. He went on to explain that the convening authority had advised the court, in the earlier case, that the court had jurisdiction over the case and that victims “were not able legally to forswear their oath of allegiance to the British crown”.⁸² The court president further noted that a “number of leading cases” had been discussed in that earlier case.⁸³ The court later declined the prosecutor’s suggestion to recall a prosecution witness for the purpose of getting more information about the oath of allegiance.⁸⁴

C. Post-trial Findings: Focus on the Accused Person’s Belief

As explained earlier in this paper, based on the 1945 Royal Warrant and Regulations framework, the decisions of guilt of these British military courts were not final until endorsed by the confirming authority.⁸⁵ At the confirmation stage, the Department of the JAG in Singapore reviewed the cases and prepared advisory reports that were considered by the confirming officer. Both *Ikegami Tomoyuki and others* and *Takashima Shotaro and another* were not confirmed. The reports and messages issued by the Department of the JAG are particularly interesting.⁸⁶

In the Department of the JAG review report on *Ikegami Tomoyuki and others* dated 13 February 1947, the Indian victims were described as being “originally Prisoners of War, but who had sworn allegiance to the Japanese”.⁸⁷ It drew a distinction between international law and domestic law, acknowledging that, based on the “domestic law of England”, it was not possible for a British subject to renounce his or her nationality while on enemy or enemy-occupied territory during a war.⁸⁸ Under this domestic law, an individual who did so would have committed an offence under the “English law of treason”.⁸⁹ However, under “international law”, when an individual “voluntarily” joined enemy forces, disciplinary action against him pursuant to the enemy’s military law would not be considered a war crime.⁹⁰ The review report went on to note that “there was no evidence” that the Indians had been “suborned” or coerced.⁹¹ It is interesting to note that in *Takashima Shotaro and another*, the prosecution had argued that questions relating to allegiance should be referred to the convening

81. *Ibid.*, at SP 00055.

82. *Ibid.*

83. *Ibid.*

84. *Ibid.*, at SP 00067.

85. 1945 Royal Warrant and Regulations, *supra* note 48 at art. 11.

86. In the file of *Ikegami Tomoyuki and others*, there was one advisory report from the Department of the JAG, dated 13 February 1947. There were two messages from the Department of the JAG, South East Asia Land Forces (Department of the JAG, SEALF) to JAG London, dated 10 January 1947 and 27 February 1947. In the file of *Takashima Shotaro and another*, there was one advisory report, dated 15 April 1947. The file also contained a copy of the same letter in the file of *Ikegami Tomoyuki and others*, dated 13 February 1947 (which referred to both *Ikegami Tomoyuki and others* and *Takashima Shotaro and another*).

87. “War Crimes Trial”, Department of the JAG advisory report, 13 February 1947, *Ikegami Tomoyuki and others*, *supra* note 5 at SP 00010.

88. *Ibid.*, at SP 00013.

89. *Ibid.*

90. *Ibid.*

91. *Ibid.*

authority, though this should only be done if the court decided that the change in allegiance had taken place “voluntarily”.⁹²

In *Takashima Shotaro and another*, the Department of the JAG review report dated 15 April 1947 observed that the defence had raised the point that the victims were originally POWs but had taken oaths of allegiance to Japan and had thus lost their POW status.⁹³ During the trial, the accused were questioned about the army order that had confirmed the non-POW status of these Indian victims. However, the prosecution’s application to recall a witness to give evidence on this point had been “unfortunately rejected” by the trial court “as a matter of law”.⁹⁴ The Department of the JAG review report went on to explain that the accused could still argue the additional point that he “honestly believed that he was acting within his rights towards men whom it was his duty to treat as such”.⁹⁵ In other words, the accused could raise the defence that he had honestly believed the victims had lost their POW status. The Department of the JAG review report advised non-confirmation of the trial court’s findings.

It should be noted that these questions on desertion and change of status were of sufficient concern for the Department of the JAG in SEALF to request advice from the JAG of the Forces in London on the issue. In a message dated 10 January 1947, F.G.T. Davis stated that he would be “grateful” for the “opinion” of JAG London on *Ikegami Tomoyuki and others* and another case tried at Jesselton, namely, *Kamikura and another*.⁹⁶ In this message, Davis observed that there was a need to distinguish between those responsible for coercing the victims to join enemy forces and those accused of ill-treating victims. The person accused of ill-treating Indian victims should not be held culpable for any coercion undertaken by another in getting the Indian victims to change their allegiance. Specifically, the message noted that the accused may have been acting on “a *bona fide* mistake of fact” and may have truly believed that the victims were “persons properly subject to Japanese military law”.⁹⁷

In a subsequent message dated 27 February 1947 from Davis to London, Davis referred to cases including *Ikegami Tomoyuki and others* as well as *Takashima Shotaro and another*, while highlighting the receipt of further information about the situation of Indian POWs during the war.

Information has since been received to the effect that Indian prisoners of war who refused to join the Indian National Army were sent to various theatres as slave labourers and that the Romu Tai, or Special Labour Force, were formed of such men.⁹⁸

92. *Takashima Shotaro and another*, *supra* note 5 at SP 00055.

93. “War Crimes Trial” Department of the JAG advisory report, 15 April 1947, *Takashima Shotaro and another*, *supra* note 5, at SP 00005.

94. *Ibid.*

95. *Ibid.*, at SP 00006.

96. “War Crimes Trial”, Department of the JAG, SEALF to JAG of the Forces, London, 10 January 1947, *Ikegami Tomoyuki and others*, *supra* note 5 at SP 00005. As this paper focuses on trials conducted in Singapore, and due to limitations of space, I will not consider the latter case.

97. *Ibid.*, at SP 00008. It is noteworthy that the report also found that the question of the victims’ status “is one of fact, though dependent on considerations of law”, thus categorizing this as a mistake of fact.

98. Message from F.G.T. Davis of the Department of the JAG, SEALF to JAG of the Forces, London, 27 February 1947, *Takashima Shotaro and another*, *supra* note 5 at SP 00007. Note that a copy of this

This information showed that there was a risk that the oaths of allegiance concerned were extracted from the victims under duress. Would this fact have impacted the trials? Based on the Department of the JAG review report on *Takashima Shotaro and another* dated 15 April 1947, such coercion by another would not automatically implicate the accused. The accused, who had not been involved in getting the victims to take these oaths of allegiance, could still have been under the mistaken belief that the victims had indeed switched their allegiance to Japan.

To sum up, the court in *Ikegami Tomoyuki and others* and the same court in *Takashima Shotaro and another* held that it was legally not possible for the Indian victims to switch their allegiance. In contrast, the post-trial Department of the JAG review reports drew a distinction between domestic law and international law, noting that, while the former prohibits the changing of allegiance during war, the latter does not. These Department of the JAG reports also pointed to the need to examine the accused persons' state of mind as well as consider the belief of the accused. How then should we explain the different approach taken by the trial authorities in these cases? One possible explanation is that the trial authorities had made a legal error and had overlooked the points stated in the Department of the JAG review reports. Such a legal mistake would not be incomprehensible, as most judges and trial personnel did not hold formal legal qualifications. Another explanation is also possible. By deciding that it was legally not possible for the victims to switch their allegiance, the court in both cases avoided having to address thorny questions about what the Indian victims did, why they did what they did, and whether they had been coerced. These trials' circumvention of the allegiance issue may be unsatisfying, but it is worth considering whether such judicial circumvention was not only reasonable but preferable, given international law's lack of guidance on desertion and the politics involved. In many ways, war crimes trials are not the best forums to study and resolve politically charged factual conundrums.

IV. ASSESSING INTERNATIONAL HUMANITARIAN LAW'S APPROACH TO DESERTION

Here, I distil themes from the cases examined above and situate them against contemporary international law developments to shed light on today's debates. This section demonstrates why there needs to be a more comprehensive approach to desertion in international humanitarian law. First, international humanitarian law instruments need to expressly recognize the reality of desertions. Second, in doing so, the different dimensions of desertion should be recognized, including the possibility of multiple side-switching. Third, it is necessary to have a clearer recognition and regulation of desertion at international law because its complex and fluid nature can cause lower-ranking military personnel to make serious mistakes when dealing with deserters.

letter, which refers to both *Ikegami Tomoyuki and others* and *Takashima Shotaro and another*, is available in the files of both cases.

A. *The Need to Recognize the Reality of Desertions*

The court in *Ikegami Tomoyuki and others* took an “impossible to renounce approach” to POW status. Based on this impossible to renounce approach to POW status, the Indian victims would not be able to renounce their POW status and the rights that came with it, even if they had voluntarily decided to desert the BIA to join the Japanese military or the Japanese-sponsored INA. The post-trial Department of the JAG review reports took a different approach. These reports focused on the voluntariness of desertion and side-switching. The Department of the JAG review report on *Ikegami Tomoyuki and others* noted that, under “international law”, when an individual who had “voluntarily” joined enemy forces, disciplinary action against the individual pursuant to the enemy’s military law would not be considered a war crime. This approach to desertion recognized the ability of POWs to give up their POW status through “voluntarily” switching sides during conflict.

The postwar 1949 Geneva Conventions and the 1977 Protocols do not have provisions that specifically deal with deserters. Presently, the Geneva scheme may be said to lean towards the impossible to renounce approach of the courts in *Ikegami Tomoyuki and others* and *Takashima Shotaro and another*. Article 7 of the Third Geneva Convention clearly states that POWs “may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention”.⁹⁹ This seems to foreclose the possibility of POWs switching sides and renouncing their POW status once they have obtained POW status. Commentators continue to debate how the Third Geneva Convention should be interpreted and applied to the situation of deserters. James Clause argues that the obligation to grant POW status under the Third Geneva Convention should not extend to those who voluntarily give themselves up, without the need to consider their intent.¹⁰⁰ Sassòli argues that deserters could avoid POW status if they make known their deserter status to the detaining authorities at the “first opportunity”.¹⁰¹ Therefore, a deserter should declare the intention to desert at the “first opportunity”, else he or she will not be able to do so during captivity.

This paternalistic approach taken by the Third Geneva Convention towards POW status seeks to minimize the risk that parties to the conflict will unduly pressure POWs in captivity to switch sides. Assessing the voluntariness of any desertion in times of conflict in captivity is difficult, as demonstrated by the facts of the Singapore Trials. If we were to apply the Third Geneva Convention’s prohibition of POW renunciation to BIA desertions, most BIA soldiers would not have been able to renounce their POW status during WWII. As explained above, when Singapore fell, the Japanese military took all Allied soldiers into captivity, at which point they obtained POW status. Subsequently, the Japanese military separated Indian soldiers from other Allied personnel, exhorting them to join the INA. BIA desertions took place over a long period of time.

99. 1949 *Third Geneva Convention*, *supra* note 19 at art. 7.

100. Clause, *supra* note 12 at 37–8.

101. This is because, based on art. 5 of the Third Geneva Convention, an individual attains POW status when he or she has “fallen into the power of the enemy”. Ideally, a deserter should declare his or her intention to desert “at the time of falling into the power of the enemy” to avoid POW status. However, practically speaking, it would only be possible for the detaining authority to determine the status of the individual through questioning at a later stage, after he or she had been captured.

The majority of Indian soldiers who switched sides did not voluntarily give themselves up to the enemy and would qualify as POWs. These Indian soldiers would not fulfil Sassòli's "first opportunity" principle.¹⁰² Nevertheless, as explained earlier, research shows that Indian soldiers were motivated by a variety of reasons to desert the BIA. Many Indian soldiers were indeed coerced, but many were also genuinely converted to the INA cause. It would be incongruous and inaccurate to consider the latter as POWs. There are of course many humanitarian advantages to the impossible to renounce approach. For example, it would avoid the situation where a Detaining Power wrongfully denies POW status to detainees on the basis that they are deserters when in fact they are not.¹⁰³ Nevertheless, the BIA desertions case-study shows that voluntary desertions can be a reality. It should be noted that even when deserters are denied POW status, they remain protected under the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, so the loss of POW status does not mean that an individual is completely unprotected.¹⁰⁴ Given the fact that voluntary desertions are a reality, it may be useful to rethink the Geneva Convention's impossible to renounce approach to POW status.

B. Multiple Side-switching and the Military's Treatment of its Own Troops

The Singapore trials considered in this paper show that desertion can in fact occur more than once and from more than one side during the same conflict. In *Ikegami Tomoyuki and others*, the Indian victims had deserted the BIA for the Japanese military. The Japanese military then caught the same Indians trying to desert the Japanese military, taking maps and other confidential information with them. It is reasonable to conclude that if true, these facts show that the Indian victims were trying to return to the British military.

The 10 January 1947 Department of the JAG review report discussed earlier also referred to the case of *Kamimura and another*, heard by a British military court in Jesselton, in former British Borneo or present-day Sabah, Malaysia.¹⁰⁵ The accused in *Kamimura and another* were also accused of war crimes against Indian victims who were part of the Romu Tai or Special Labour Force working alongside Japanese forces in Kuala Belait, which is part of the former British Borneo or present-day Brunei. Similarly, the defence argued that these Indian victims were not POWs. In this case, the accused alleged that the Indian victims had disobeyed orders, had collected weapons, and were planning to fight for the Allies. The accused had launched a night counter-

102. *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949 (entered into force 21 October 1950), online: ICRC <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument>> [1949 *Fourth Geneva Convention*]. Sassòli's "first opportunity" addresses itself to those who have "acted upon his intent to sever his allegiance to the Power he was serving by abandoning his forces ... or, in a combat situation, by abstaining from fighting immediately prior to falling into the power of the enemy and seizing the first opportunity to confirm to the Detaining Power his willingness to sever his allegiance to the Power on which he depends". Sassòli, *supra* note 10 at 13.

103. Esgain and Solf, *supra* note 9 at 559.

104. Sassòli, *supra* note 10 at 21–2.

105. "War Crimes Trial", message from F.G.T. Davis, Department of the JAG, SEALF to JAG of the Forces, London, 10 January 1947, *Ikegami Tomoyuki and others*, *supra* note 5 at SP 00008.

attack, during which fifty to seventy-two Indian victims were killed. The Department of the JAG review report noted the argument by the defence that the Indian victims were not POWs, having sworn allegiance to the Japanese. The report, however, went on to recognize the “further transition in the status of the deceased Indians” because, by arming themselves and declaring their intention to fight for the Allies, the Indian victims had “thereby effected their own liberation and re-acquired their original belligerent status”.¹⁰⁶ The attack organized by the accused was therefore “an incident of war” and “not contrary to international law and usage”.¹⁰⁷

Deserters can be in a particularly vulnerable position. On the one hand, deserters may be hostilely treated by POWs from their former armed forces, as these POWs had chosen to affirm their allegiance to the said armed forces even in captivity. Sassòli observes that, in the light of possible “tension” between these two groups, detaining powers should house deserters and POWs separately.¹⁰⁸ On the other hand, deserters may be treated with suspicion by the forces to which they have deserted, even when the former have pledged their allegiance to the latter. Deserters may be harshly treated compared to other members of the force. This may be particularly so for deserters who have deserted more than once. The loyalty of these deserters may be held in doubt, and they may be suspected of being spies. International humanitarian law needs to be developed to specifically deal with the situation of deserters. Clear recognition and regulation of the status of deserters will minimize the risks they face.

BIA desertions highlight a more fundamental gap in international humanitarian law. This law does not attempt to regulate how states treat their own forces. States are presumed to have an interest in treating their own forces well. The Singapore trials discussed here show that this is not necessarily the case. It should be recalled that the treatment of a party’s own troops was an issue in *Ikegami Tomoyuki and others* and *Takashima Shotaro and another*. In both cases, the defendants and defence witnesses claimed that they did not see any difference between the Japanese military’s treatment of the Indian victims and Japanese soldiers. Research has confirmed that ordinary Japanese military personnel were themselves subject to extremely harsh treatment in the Japanese military.¹⁰⁹ The Japanese military’s training and disciplinary practices were brutal and often inhumane, aimed at inculcating unquestioning obedience and endurance among military subordinates.

Should international humanitarian law be further developed to address how forces treat their own troops? This would require a fundamental rethinking of the law of armed conflict, which is beyond the scope of this paper. My aim here is to highlight gaps in international humanitarian law, as revealed by the facts and discussions in *Ikegami Tomoyuki and others* and *Takashima Shotaro and another*. In many ways, the heart of the issue in these Singapore trials was not really whether the Indian victims were to be considered POWs or persons associated with the Japanese military.

106. *Ibid.*, at SP 00009.

107. *Ibid.*

108. Sassòli, *supra* note 10 at 25.

109. See generally Edward J. DREA, “In the Army Barracks of Imperial Japan” (1989) 15 *Armed Forces and Society* 329.

Rather, the root problem stemmed from the Japanese military's inhumane treatment of all those under its control.

C. *Status Fluidity and Mistakes by Lower-ranking Military Personnel*

These Singapore trials also highlight how difficult it is for lower-ranking individuals to independently assess whether those under their charge are POWs or deserters in chaotic conflict situations. The defendants all alleged that they had been told that the Indian victims were part of the Japanese Special Labour Force or Romu Tai. Among others, it will be recalled that the accused described how the Indian victims had their own commander, were given the relatively important responsibility of "guarding of the oil fields", and had "a reasonable amount of freedom".¹¹⁰ These facts appeared to show that the Indians were treated as Japanese soldiers.¹¹¹

It will often be difficult for mid-ranking or low-ranking military personnel to independently determine whether "deserters" are genuine POWs or fellow combatants. This is especially so in the messy circumstances of armed conflict. Deteriorating war conditions or resource shortages may result in POWs being given relative freedom or being given jobs that would normally be deemed too sensitive. Such situations may be coupled with widespread rumours or beliefs about desertion and side-switching. Language may be an additional barrier to communication. Some mid-ranking or low-ranking Japanese military personnel may truly have believed that these BIA soldiers were members of the Japanese military as opposed to POWs.

The Department of the JAG review reports considered here recognized the possibility that the defendants had genuinely made mistakes. As mentioned above, in *Ikegami Tomoyuki and others*, the Department of the JAG review report dated 13 February 1947 noted defence counsel's argument that, even if the victims were POWs, the highest-ranking defendant had "acted in the *bona fide* belief" that the victims had "the status of Japanese soldiers" rather than POWs.¹¹² As for the other defendants, the Department of the JAG review report noted the defendants' claim that they believed they were implementing an "apparently lawful" order and were therefore not culpable.¹¹³ There needs, however, to be a distinction made between the two types of mistakes highlighted in the Department of the JAG review report. The first mistake would commonly be known today as a "mistake of fact", while the second deals with a mistake relating to superior orders. I will focus on the former in this paper as there have been previous studies on mistakes of laws relating to superior orders in British postwar trials.¹¹⁴

A closer scrutiny of the "mistake of fact" arguments made by the defendants shows that at least some of these arguments may be better classified as what Kevin Heller

110. Testimony of Takahashi Tatsuo, *Ikegami Tomoyuki and others*, *supra* note 5 at SP 00046.

111. *Ibid.*

112. *Ibid.*, at SP 00012.

113. *Ibid.*, at SP 00013.

114. JIA Bing Bing, "The Plea of Superior Orders in the Hong Kong Trials" in Suzannah LINTON, ed., *Hong Kong's War Crimes Trials* (Oxford: Oxford University Press, 2013), 169. On superior orders in the Singapore Trials, see CHEAH Wui Ling, "The Superior Orders Defence at the Post-War Trials in Singapore" in Kirsten SELLARS, ed., *Trials for International Crimes in Asia* (Cambridge: Cambridge University Press, 2015), 75.

describes as a “mistake of legal element”.¹¹⁵ Specifically, defence counsel in *Takashima Shotaro* argued that the victims were not “pure” POWs, that they were “released” from POW status by the Japanese military, and that they were members of the “Indian Labour Unit”.¹¹⁶ If this was so, the mistake made was not a straightforward mistake of fact about whether the Indian victims were POWs or Japanese military personnel. The mistake made by Japanese military personnel in this case is better described as a mistake of legal element or “MLE”.¹¹⁷ It is noteworthy that, under the Statute of the International Criminal Court (hereinafter “the ICC Statute”), certain mistakes of fact or law may exclude criminal responsibility.¹¹⁸ The exact scope of MLEs recognized at international criminal law is subject to academic debate, and Heller has persuasively argued for the ICC Statute to be clearly amended so that MLEs exclude criminal responsibility only if the mistake made was reasonable.¹¹⁹ Reasonable knowledge of international humanitarian law is something that we should cultivate and expect from those engaging in armed conflict. However, such a reasonable understanding of the law is only feasible if international humanitarian law speaks clearly to soldiers of all ranks. By clearly recognizing and regulating desertion, international law may reduce mistakes being made by soldiers of lower ranks when assessing the status of deserters.

V. A MORE EXPLICIT INTERNATIONAL HUMANITARIAN LAW APPROACH TO DESERTION

Despite the continued and even increasing relevance of desertion in the armed conflicts of today, existing international humanitarian law instruments currently do not address desertion in a targeted or detailed way. The Third Geneva Convention takes a generally paternalistic approach to POW status. It holds that an individual cannot renounce POW status upon obtaining it. While recognizing the value of this approach, this paper’s case-study of BIA desertions shows that the current approach to POW status in international law fails to consider the complex nature of desertion, as well as the reality that deserting individuals may genuinely wish to change their allegiance. There is the need for present-day instruments to recognize that desertion occurs, and expressly address the situation of deserters. When assessing the courts’ approach in *Ikegami*

115. Kevin Jon HELLER, “Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute: A Critical Analysis” (2008) 6 *Journal of International Criminal Justice* 419 at 420. I do not aim to enter into a comprehensive discussion of MLE here. My aim is to highlight the fact that international law’s lack of explicit guidance on desertion may result in MLEs made by lower-ranking personnel, and that these mistakes are recognized to a certain extent by the Statute of the International Criminal Court.

116. “Closing Address in Defence of Asako”, *Takashima Shotaro and another, supra* note 5 at SP 00091.

117. *Ibid.* I do not aim to enter into a comprehensive discussion of MLE here. My aim is to highlight the fact that international law’s lack of explicit guidance on desertion may result in different types of mistakes (mistakes of fact and MLEs), not all of which exclude criminal responsibility.

118. Art. 32, *Rome Statute of the International Criminal Court*, 17 July 1998 (entered into force 1 July 2002), online: ICC <https://www.icc-cpi.int/nr/trdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/rome_statute_english.pdf>.

119. Heller, *supra* note 115 at 444. See also Heller’s suggestions on how the ICC Statute may be amended to clearly require MLEs to be reasonable before they are recognized, at 444–5.

Tomoyuki and others and *Takashima Shotaro and another*, it is important to note that, while international law did not prohibit desertion, neither did it have clear guidelines on the consequences of desertion. Given this, and the politically charged questions surrounding BIA desertions, it is understandable why the court took the approach of treating desertion as legally impermissible.

The experience of BIA deserters shows that desertions may be coerced but also that desertions, even after obtaining POW status, may be voluntary and authentic. Desertion is not only a reality but may happen more than once during a conflict. The Singapore trials considered here show that individuals may switch sides more than once. There is a need for this situation to be at the very least recognized and regulated at international law. Deserters may face rough treatment from both sides, from those they deserted from and those they deserted to. The former may view them with disappointment or hostility while the latter may view them with suspicion. Lower-ranking individuals may find it particularly hard to distinguish between deserters and genuine POWs. By expressly regulating desertion, international law can try to ensure that deserters are properly identified and accorded proper conduct.

The reality and complexity of desertion, as exemplified by BIA desertions and discussions in the Singapore Trials, requires a more explicit and comprehensive approach at international law. The protectionist approach of the Third Geneva Convention assumes that the protection of POW status is paramount, but this ignores the fact that voluntary desertions are very much a reality. The protection of deserters may be better achieved by regulating and facilitating desertion instead of prohibiting it completely.