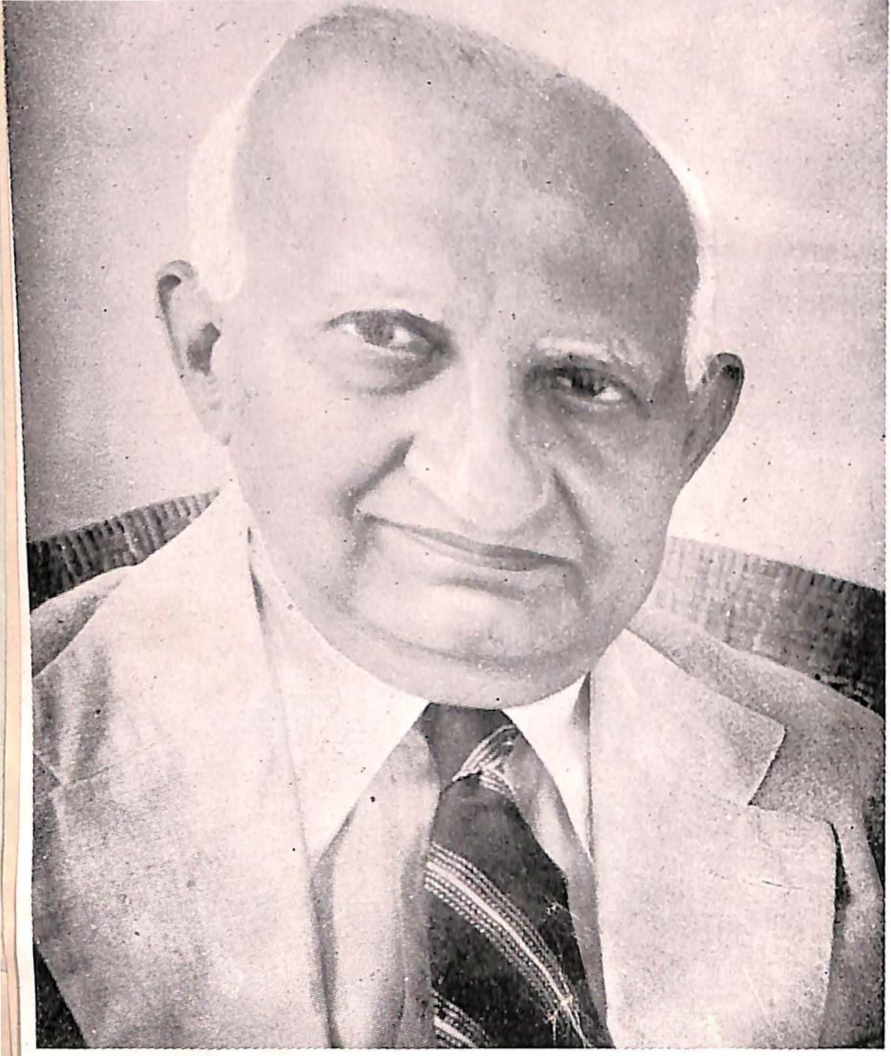
I. N. A. Defence



Shri. Bhulabhai J. Desai

(Photo by UDIT GOPAL)

I. N. A. DEFENCE

[*Subject People's Right to Fight for Freedom*]

BHULABHAI J. DESAI

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A. N. Sarkar (Legal Adviser).

FOREWORD

The first I.N.A. trial has been perhaps the most notable trial in the history of British India; indeed in some respects it may rank as one of the most notable trials in history.

It had a double aspect. It was the occasion of a debate on far-reaching and in some respects altogether novel propositions of International Law, a subject of lasting interest to lawyers and those interested in law. To the ordinary citizen it was the fascinating and inspiring story of a heroic effort—the most famous in Indian history—of a great Indian patriot, supported by thousands of his countrymen, to liberate their country.

War has always been held legal by International Law. It has been defined as "a state of regulated violence in which the conduct of hostilities is governed by certain principles and rules which rest in part on custom and in part on convention and which are sanctioned in the last resort by the action of international society, however uncertain may be their operation." It is further a well accepted proposition of that law that anything done in the prosecution of war, according to civilised notions of warfare, has and can have no consequences in municipal law.

Taking its stand on these accepted principles of International Law, the Defence in the I.N.A. trial contended that the acts in respect of which the charges were laid were acts done in the prosecution of war.

But could a state of war exist between a Provisional Government of Free India such as was shown to have existed by the evidence and a sovereign State such as Great Britain?

At one time it was thought that in order to be able to declare war the State must be an independent or a sovereign State. International Law, however, in the matter of war has grown with the change of circumstances.

Modern International Law has recognised that a state of war may exist between "a State and a Suzerain, as in the Boer War." Or it may exist where one of the belligerents claims sovereign rights against the other, whether in a federal or a unitary State. A civil war between members of the same society has also been accepted as war within the meaning of International Law. In a civil war if the party seeking to dislodge the existing Government succeeds and the independence of the Government it has set up is recognised, then the acts of such Government are from the commencement of its existence regarded as those of an independent State. If, however, the political revolt fails, still if actual war has been waged, acts of legitimate warfare connot, according to International Law, be made the basis of individual liability. It was on this basis that the confederate Government of the Southern States in the American Civil War was regarded by the American Courts as the military representative of the insurrectionists against the military authority of the United States.

The matter is carried a step further when the subjects of a State rise in revolt against the State itself. Could the insurgents be said to be waging war against their parent State in a legal sense? Here again, International Law lays down that if the insurgents are sufficiently large in numbers and set up a 'de facto' political organisation with resources to carry on the duties of a State and to employ an army to fight on its behalf, the struggle will be regarded as a state of war.

International Law must in the nature of things evolve doctrines to suit the changing conditions and notions of mankind. The Defence contended that modern International Law has recognised the right of subject races not at the moment independent, to be so organised as to fight for their liberation an organised war through an organised army. The individual members of an army so organised were, it was contended, not answerable before any municipal Court for what was done in due prosecution of that war.

So far as the matter rested on facts, Defence had to establish that the Indian National Army was an organised army belonging to a duly organised State which had declared war on Britain and America and was fighting British Forces in due prosecution of that war. This, it appears, the Defence were able to do in a great measure by relying on the evidence led by the Prosecution itself. The Prosecution, not aware perhaps of the line of defence, and concentrating on the gravity of the acts of what it believed to be insurgents and rebels, tendered a considerable body of evidence which proved the formation of the Provisional Government of Free India, the raising of forces by it, and the putting of those forces in the field against Britain. That indeed was the material which the Defence needed for their contentions based upon principles of International Law. In the result, the Defence established that the acts which were the subject-matter of the charges were acts done in the course of the operations of the organised army of a Government which had attained to the status of statehood, which possessed territories ceded to it by the Japanese, which had been accorded recognition as a Government by other States, which had received the plenipotentiary of another State, and which had formally made a declaration of war against Britain and America.

Interesting questions also arose in regard to the law of belligerency. It was contended by the Defence that the existence of war was purely a question of fact. Whether a struggle amounted to a war or not was to be determined not from the relation of the combatants to each other, but from the mode in which the struggle was carried on. If in exercise of what has been called "the sacred right of rebellion" a considerable body of subjects of a State rose in revolt and the struggle became one in which a mass of the population engaged itself in warlike operations against the State that population was entitled to be treated as belligerents. In other words, if in making its struggle for freedom, a subject people reached a stage at which it could be said to be a struggle waged by an organised army ac-

cording to the accepted rules of war that army must be accorded, all the rights, privileges and immunities of the army of a belligerent in war. That status of belligerency will involve immunity in respect of all acts done in the prosecution of that war. Insurgents fighting against their parent State for liberation may fail or succeed. According to the maxim of International Law, the successful revolution would be the Government established by law. But even if the revolution fails, if the fight they carried on was a fight by an organised army in the manner of war, they would still be entitled to recognition as belligerents.

An interesting argument also arose in regard to the allegiance owed by officers and other ranks of the Indian army who had joined the I.N.A. Allegiance may be said to be owed to the King and the country. A charge of treason in England is a charge of working against the King and the country. But a difficult question arises where "the country and the King do not coincide and where there is an imposed allegiance on a subject people." The evidence was overwhelming that the object of the I.N.A. was to fight for the liberation of India, and that they had no other object except the liberation of their country. These soldiers were, therefore, though nominally fighting against the King really fighting to liberate their country. It was further contended that they were freed from the allegiance owed by them by the events that had happened. Soon after the Japanese had overrun Malaya and Singapore the Indian officers and ranks numbering anything between 30,000 to 45,000 duly assembled were handed over by Colonel Hunt on behalf of the British Government to a representative of the Japanese Government. The Japanese representative thereupon addressed the Indian prisoners of war stating that those of them who wanted to join an army for the purpose of liberation of their own country were free to do so. In the circumstances, those who were so handed over had justification to believe that the only allegiance they owed was allegiance to their country.

A further point of controversy was the applicability of the principles of International Law in the circumstances of the case. The Crown contended that International Law as such had no binding force before the Tribunal which was dealing with the matter and that the Tribunal could take cognizance only of the rule of domestic or municipal law. This contention led to an interesting argument on behalf of the Defence to the effect that even in municipal Courts the law of nations had as binding a force as statute or any other law. The Defence contended that the setting and the circumstances of the acts charged as offences removed them altogether from the pale of municipal law and brought them in the domain of the law of nations.

It must remain a matter of regret that legal issues so far-reaching and involving subtle questions of International Law should have arisen before a Tribunal which was not composed of men trained in law and which was unfamiliar with the administration of justice.

That fact, however, only enhances our admiration for the greatness and grandeur of the argument advanced on behalf of the Defence before that Tribunal. In dealing with a Tribunal of this character, the work of the Counsel for the Defence became ever so much more difficult. His was the task of giving an exposition of complicated matters of International Law in very simple language so that the Judges whom he was addressing, men of war and common sense, may grasp and understand them. It was to this end that Shriyut Bhulabhai used his penetrating intellect and his persuasive eloquence. No one who reads his speech for the Defence can fail to realise that it is an effort worthy of a great and eminent advocate.

M. C. SETALVAD

Captain Shah Nawaz Khan of 1/14 Punjab Regiment. Captain Premkumar Sahgal of 2/10 Baluch Regiment and Lieutenant Gurubax Singh Dhillon of 5/14 Punjab Regiment who had all joined the Indian National Army, organised by the Provisional Government of Free India under the leadership of Sri Subhas Chandra Bose, at Singapore (Shonan) during 1943-45, were arrested as prisoners of war after the Allied forces recaptured Malaya and Burma and were later put on trial before a Court Martial in the Red Fort of Delhi. They were all charged with waging war against His Majesty the King Emperor of India, Lt. Dhillon with the offence of committing murder of Hari Singh, Dulichand, Daryao Singh and Dharam Singh, on or about 6th March, 1945, and the other two with abetment of murder.

The Court Martial that tried the accused in this case consisted of Major-General A. B. Blaxland (President), Brigadier A. J. H. Bourke, Lt.-Col. C. R. Stott, Lt. Col. T. I. Stevenson, Lt.-Col. Nasir Ali Khan, Major B. Pritam Singh and Major Banwari Lal, all of Indian Army. Col. F. C. A. Kerin was appointed as the Judge-Advocate. Sir Nusserwanji P. Engineer, Advocate General of India, assisted by Lt.-Col. P. Walsh conducted the Prosecution, while the accused were defended by a Committee consisting of Sri Bhulabhai J. Desai, Rt. Hon. Sir Tej Bahadur Sapru, Pandit Jawaharlal Nehru, Dr. Kailash Nath Katju, Mr. Asaf Ali, Bukshi Sir Tek Chand, Rai Bahadur Badri Dass, Kanwar Sir Dalip Singh, Dr. P. K. Sen, Md. Shafi Daudi, Inder Deo Dua, Shiv Kumar Shastri, Ranbeer Chand Soni, Rajinder Narayan, Sultan Yar Khan, Sri Narayan Andley and J. K. Khanna.

The trial continued with short intervals for more than two months during which the Prosecution tendered voluminous documentary evidence and cited many witnesses in support of the grave charges against the accused. At the

concluding stage of the case Sri Bhulabhai J. Desai, Advocate, Bombay, as the leading counsel for the Defence, delivered his address, which will take a very high rank in the history of such trials on account of fullness, forensic skill, the exposition of the principles of International Law and the brilliance of argument. The whole of that address has such a political value that the Congress Publications thought it worthwhile to depart from its rule of issuing 32 page booklets and publish it in bookform.

The great trial came to a close on 3rd January 1946 when H. E. the Commander-in-Chief, Sir Claude Auchinlek, as the Confirming Officer in this case issued the following 'communique':—

"Capt. Shah Nawaz Khan, Capt. Sahgal and Lt. Dhillon have stood their trial by Court Martial on charges against all three of waging war against the King Emperor. Lt. Dhillon being also charged with murder and the other two with abetment of murder.

"The findings of the Court are that all three are guilty of the charge of waging war, while Capt. Shah Nawaz Khan is also convicted of the charge of abetment of murder, Lt. Dhillon is acquitted of the charge of murder and Capt. Sahgal of the charge of abetment of murder.

"Having found the accused guilty of the charge of waging war, the Court was bound to sentence the accused either to death or to transportation for life; no lesser sentence was permissible under the law.

"The sentence of the Court on all three accused is transportation for life, casheering and forfeiture of arrears of pay and allowances.

"No finding or sentence by Court Martial is complete until confirmed. The Confirming Officer, in this case the Commander-in-Chief, is satisfied that the findings of the Court are in each instance in conformity with the evidence and he has, therefore, confirmed them.

"The Confirming Officer is, however, competent to mitigate, commute or remit the sentences. As already stated in the Press, it is the policy of the Government of India to bring to trial in future only such persons as are alleged, in addition to waging war against the State, to have committed acts of gross brutality; and it has been announced that in reviewing sentences in any trials the competent authority will have regard to the extent to which the acts proved offend against the canons of civilised behavoiur.

"Lt. Dhillon and Capt. Sahgal have been acquitted of the charges of murder, and abetment of murder and it has not been alleged that they were guilty of other acts of brutality. Although Capt. Shah Nawaz Khan has been found guilty of abetment of murder and the acts proved against him were harsh, the prevailing circumstances have been taken into account by the Confirming Officer.

"The Commander-in-Chief has decided, therefore, to treat all three accused in the same way in the matter of sentence, and to remit the sentences of transportation for life against all three accused.

"He has, however, confirmed the sentences of cashiering and forfeiture of arrears of pay and allowances, since it is in all circumstances a most serious crime for an officer or soldier to throw off his allegiance and wage war against the State.

"This is a principle which it is essential to uphold in the interests of the stability of any Government by Law established, present or future."

Congress House,
Bombay 4.
Subhas Day,
23rd January, 1945.

CONGRESS PUBLICITY BOARD
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PROCLAMATION

OF THE
PROVISIONAL GOVERNMENT OF
AZAD HIND

After their first defeat at the hands of the British in 1757 in Bengal the Indian people fought an uninterrupted series of hard and bitter battles over a stretch of one hundred years. The history of this period teams with examples of unparalled heroism and self-sacrifice. And in the pages of that history, the names of Sirajuddaula and Mohanlal of Bengal, Haider Ali, Tippu Sultan and Velu Tampi of South India, Appa Sahib Bhonsle and Peshwa Baji Rao of Maharashtra, the Begums of Oudh, Sardar Shyam Singh Atariwala of Punjab and last but not least Rani Laxmibai of Jhansi. Tatia Topi, Maharaj Kunwar Singh of Dumraon and Nana Sahib among others—the names of all these warriors are forever engraved in letters of gold. Unfortunately for us, our forefathers did not at first realise that the British constituted a grave threat to the whole of India and they did not therefore put up a united front against the enemy. Ultimately, when the Indian people were roused to the reality of the situation, they made a concerted move and under the flag of Bahadur Shah in 1857, they fought their last war as free men. In spite of a series of brilliant victories in the early stages of this war, ill-luck and faulty leadership gradually brought about their final collapse and subjugation. Nevertheless, such heroes as the Rani of Jhansi, Tatia Topi, Kunwar Singh and Nana Saheb live like eternal stars in the nation's memory to inspire us to greater deeds of sacrifice and valour.

Forcibly disarmed by the British after 1857 and subjected to terror and brutality, the Indian people lay prostrate for a while—but with the birth of the Indian National Congress in 1885 till the end of the last World War, the Indian people, in their endeavour to recover their lost liberty tried all possible methods—namely, agitation and propaganda, boycott of British goods, terrorism and sabotage—and finally, armed revolution. But all these efforts failed for a time. Ultimately, in 1920, when the Indian people haunted by a sense of failure, were groaping for new methods, Mahatma Gandhi came forward with the new weapon of non-co-operation and civil-disobedience.

For two decades thereafter, the Indian people went through a phase of intense patriotic activity. The message of freedom was carried to every Indian home. Through personal example, people were taught to suffer, to sacrifice, and to die in the cause of freedom. From the cities to the remotest villages, the people were knit together into one political organisation. Thus the Indian people not only recovered their political consciousness, but became a political entity once again. They could now speak with one voice and strive with one will for one common goal. From 1937 to 1939, through the work of the Congress Ministries in eight provinces, they gave proof of their readiness and their capacity to administer their own affairs.

Thus, on the eve of the present World War, the stage was set for the final struggle for India's liberation. During the course of this war, Germany with the help of her allies, has dealt shattering blows to our enemy in Europe—while Nippon, with the help of her allies has inflicted a knockout blow to our enemy in East Asia. Favoured by a most happy combination of circumstances, the Indian people today have a wonderful opportunity for achieving their national emancipation.

For the first time in recent history, Indians abroad have also been politically roused and united on one organi-

sation. They are not only thinking and feeling in tune with their countrymen at home, but are also marching in step with them along the path to freedom. In East Asia in particular, over two million Indians are now organised as one solid phalanx, inspired by the slogan of "Total Mobilisation". And in front of them stand the serried ranks of India's Army of Liberation, with the slogan "Onward to Delhi" on their lips.

Having goaded Indians to desperation by its hypocrisy and having driven them to starvation and death by plunder and loot, British rule in India has forfeited the goodwill of the Indian people altogether, and is now living a precarious existence. It needs but a flame to destroy the last vestige of that unhappy rule. To light that flame is the task of India's Army of Liberation. Assured of the enthusiastic support of the civil population at home and also of a large section of Britain's Indian Army, and backed by gallant and invincible allies abroad, relying in the first instance on its own strength, India's Army of Liberation is confident of fulfilling its historic role.

Now that the dawn of freedom is at hand, it is the duty of the Indian people to set up Provisional Government of their own, and launch the last struggle under the banner of that Government. But with all the Indian leaders in prison and the people at home totally disarmed —it is not possible to set up a Provisional Government within India or to launch an armed struggle under the aegis of that Government. It is therefore the duty of the Indian Independence League in East Asia, supported by all patriotic Indians at home and abroad, to undertake this task—the task of setting up a Provisional Government of Azad Hind (Free India), and of conducting the last fight for freedom, with the help of the Army of Liberation (that is, the Azad Hind Fauj or the Indian National Army) organised by the League.

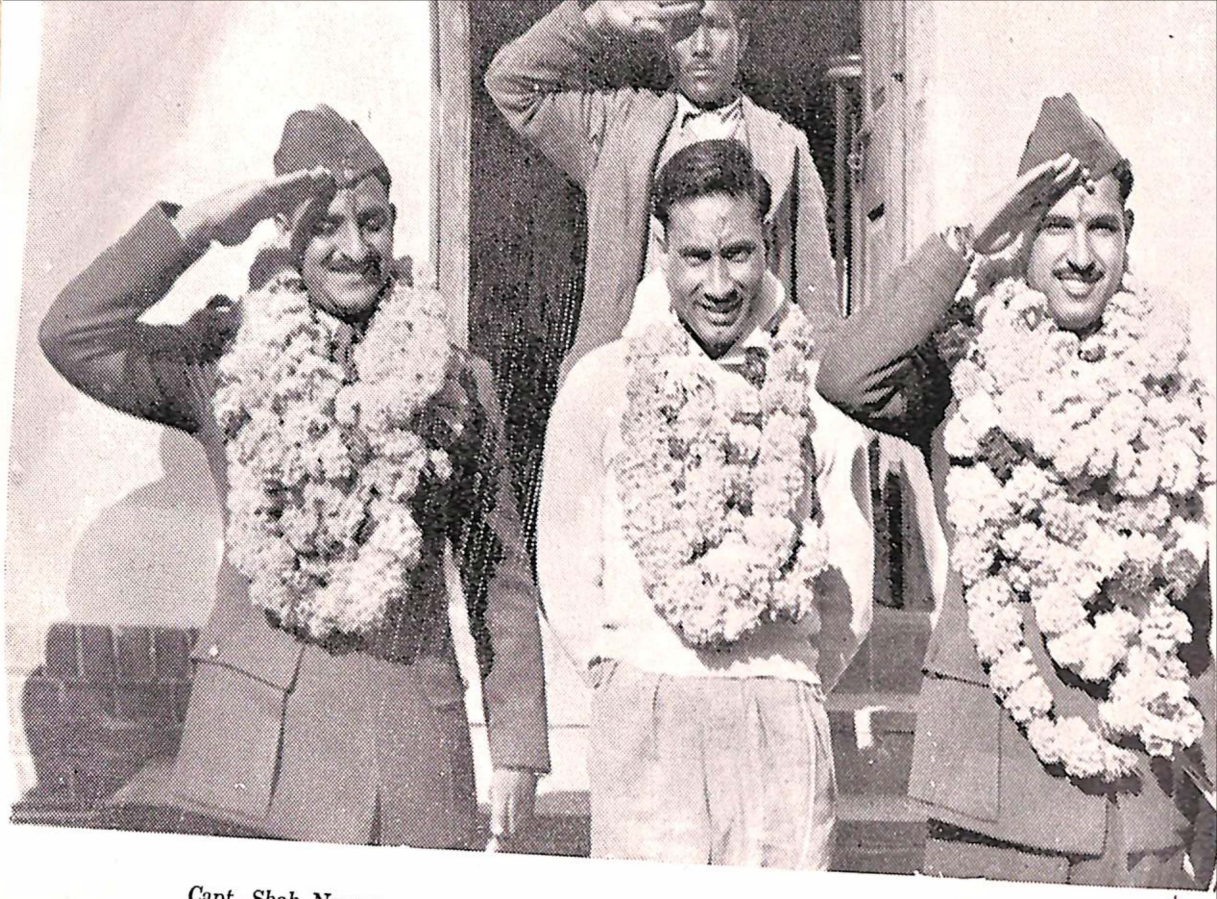
Having been constituted as the Provisional Government of Azad Hind by the Indian Independence League in

East Asia, we enter upon our duties with a full sense of the responsibility that has devolved on us. We pray that Providence may bless our work and our struggle for the emancipation of our Motherland, and our comrades in arms for the cause of her Freedom, for her welfare and her exaltation among the nations of the world.

It will be the task of the Provisional Government to launch and to conduct the struggle that will bring about the expulsion of the British and of her allies from the soil of India. It will then be the task of the Provisional Government to bring about the establishment of a permanent National Government of Azad Hind constituted in accordance with the will of the Indian people and enjoying their confidence. After the British and their allies are overthrown, and until a permanent National Government of Azad Hind is set up in Indian soil, the Provisional Government will administer the affairs of the country in trust for the Indian people.

The Provisional Government is entitled to and hereby claims, the allegiance of every Indian. It guarantees religious liberty, as well as equal rights and equal opportunities to all its citizens. It declares its firm resolve to pursue the happiness and prosperity of the whole nation and of all its parts, cherishing all the children of the nation equally and transcending all the differences cunningly fostered by an alien government in the past.

In the name of God, in the name of bygone generations who have welded the Indian people into one nation, and in the name of the dead heroes who have bequeathed to us a tradition of heroism and self-sacrifice, we call upon the Indian people to rally round our banner, and to strike for India's freedom. We call upon them to launch the final struggle against the British and all their allies in India, and to prosecute the struggle with valour and perseverance and with full faith in Final Victory—until the enemy is expelled from Indian soil, and the Indian people are once again a Free Nation.



Capt. Shah Nawaz,

Lieut. Dhillon

I. N. A. DEFENCE

ADDRESS BY

SRI BHULABHAI J. DESAI

During the last many days you have heard evidence on the two charges with which my clients, the accused before you, have been arraigned. Shortly stated, the two charges are waging war against the King and, without detailing anything, murder and abetment of murder, in that certain deserters were tried and ordered to be shot. My submission to the Court is that substantially there is really one charge before the Court, because in so far as the charge of murder is concerned it is a part of the first charge; and I say so for this reason that it would be quite possible, in the case of a charge of waging war against the King, to be able to charge every single act of firing a shot, which would be, I think, 'reducio ad absurdem'; and therefore it will be my duty later on to point out to the Court that really and truly there is only one charge before the Court and that is waging war against the King. Evidence has been admitted on other matters to which I do not wish at this stage to refer, so that for the moment, I will occupy the time of the Court for the purpose of considering what facts have been established in support of the first charge, namely, waging war against the King; and in due course it will also be my duty to point out to the Court that in so far as the second charge is concerned, there is no foundation in fact for it except to this extent that in reference to the four persons who are alleged to have been shot there is on record evidence that they were tried and sentence passed. In reference to Muhammed Hussain, there is nothing on record to show that any sentence was passed. In all these

cases it will be my duty to submit that on the evidence the Court is bound to come to the conclusion that though sentence was passed in one case and not at all passed in the other, none of these sentences was actually carried out. That is the nature of the examination on facts which will be necessary for me to place before this Honourable Court.

There are one or two matters which I am bound to mention to the Court before I come to the actual facts of the case. This case raises issues which are not of the normal type which a Court Martial is called upon to decide, because most, if not all, of such cases are generally cases of individual derelection of duty or individual offences. Here is a case in which, I venture to say—and the evidence supports it—that it is not at all a case of what you might call three individuals waging war against the King. The evidence amply bears out the fact that these men charged before you were a part of an organised army which waged war against the King even according to the Prosecution. Therefore the case before the Court is not a personal case of any kind or sort. The honour and the law of the Indian National Army are on trial before this Court. What is now on trial before the Court is the right to wage war with immunity on the part of a subject race for their liberation. I shall be able to cite authorities on International Law that a nation or part of a nation does reach a stage where it is entitled to wage war for its liberation, and I shall be able to prove that point to your Honours' satisfaction.

There is another thing I wish to say, and I say it with a certain degree of earnestness. This case has naturally aroused a considerable amount of public interest. It is not for me to say whether it is right or not but the fact remains that it is so, and opinions have been expressed from the point of view of the public and from the point of view of what I might call 'official sources' beginning with the Viceroy of India. You, Sirs, having sworn to do justice to these men on the evidence before you will, I have not the smallest doubt, come to your own decision guided by your

conscience and entirely unaffected by opinions for or against them. For in all trials of this kind—and in a few of them I have had the honour to be engaged—it is very difficult for the human mind to maintain that detachment which justice requires. In the case of Juries I have had to caution them against the use or abuse of the effect of public expressions of opinions on matters which it is for them to decide. In this case what I wish to say is this. Having studied the rules which guide the proceedings before this Court I find that you, Sirs, are the judges both of law and of fact. I am aware that the Judge-Advocate who is your adviser, will take care to do justice to everything that myself or my learned friend on the other side will place before you on questions of law and fact, and while you will very seriously regard his advice in the end, the final decision is your privilege and your responsibility. Therefore what I might have done in another place I do not do before you and that is, I cannot say that I will address the Judge on law and the Jury on the facts. There it is an easier process because I must confess that before a trained Judge it is easier to deal with the question of law than before a tribunal of this character. At the same time I have this consolation that sometimes if the law is plain—as I submit it is in this case, it will probably be much easier, appealing to commonsense, to establish the law on which I rely, and I desire to ask your indulgence and your attention in the somewhat difficult task which I am undertaking.

My next submission to the Court is that I desire, as far as possible, to state categorically the conclusions of fact which are established in this case. Having done that I will proceed to deal with the law applicable to them. In dealing with any single item, should any doubt arise in the Court's mind, I trust that you will be pleased to tell me, so that, if it is necessary, I will go into the details of evidence, because as at present advised, I do not desire, unless there is a real doubt about it, to weary you with reading over 250 pages of evidence and about 150 pages of exhibits,

which are before the Court. A few important ones I will certainly read where necessary. Having regard to the attention which the Court has paid to the evidence as it was recorded, I will avoid reading them in extenso.

With these remarks I now proceed to place before the Court what I submit are the conclusions of fact justified by evidence. Before I do that, I will give you a few important events. In the month of December 1941, war was declared by Japan against Britain and America. Then followed certain events which are the subject-matter of controversy to a certain extent before this Court. The next event of importance is the surrender of the British Indian forces at Singapore, which took place on 15th February, and then the most important material event took place on 17th February at Farrer Park.

The next event of importance, after that which the Court will have to bear in mind, is the formation of what I shall shortly describe as the first Indian National Army in the month of September 1942. The next event of importance is the dissolution of that Army in the month of December 1942 and the arrest of Capt. Mohan Singh. The next important events thereafter are the efforts which were being made for the formation of the second Indian National Army. On 2nd July 1943, Sri Subhas Chandra Bose arrived in Singapore. He later took command of the Indian National Army and there was a conference of what is called Greater East Asia attended by Indians, with delegates belonging to the Indian Independence League from different parts of the Far Eastern countries. One of the resolutions at that Conference was that a Provisional Government of Free India should be established. The next event of importance is that on the 21st October 1943 there was proclaimed a Provisional Government of Free India which for brevity I will call 'Provisional Government'. That Proclamation is one to which I shall refer later, but now I will try to give the Court events of importance which the Court will have to bear in mind. On the proclamation of

that Government the different Ministers concerned with the functions of the State took Oaths of Allegiance, of course headed by Netaji Subhas Chandra Bose as the head of the State. The next event of importance is the declaration of war by that Government on Britain and America. The next event of importance thereafter is that so far as the I.N.A. was concerned it began to carry out its functions under the orders of the new State. Thereafter the events of importance so far as the actual facts are concerned, are only three: the movement of this Government from Singapore to Rangoon; the movement of the Indian National Army from Burma into, beyond and within the territories of India right up to Kohima; and the rest, dealing with the retreat of that Army back again until the event which took place at Rangoon slightly before, at the time, and slightly after the occupation of Burma by the British Forces. These, Sirs, are the main undisputed events with which the Court is concerned. Bearing in mind these events, I shall now place before the Court the conclusions of facts which we submit have been established either in cross-examination of the evidence of the prosecution or in the affirmative evidence which we have called in defence.

The first conclusion of fact which we ask this Court to accept is that the Provisional Government of Free India was formally established and proclaimed. I submit, Sirs, there can be no doubt about this event and no cross-examination of witnesses who have been called to prove that event, as far as I can see, has been seriously attempted. You have to remember, Sirs, the picture of the proclamation of that Government and Exhibits put in on that point. Before I proceed any further, I wish to call attention to that proclamation. It is Exhibit FFFF before this Court, I do not wish to read the whole of that document; the only passages which I wish to read are passages which bear on the issue before this Court.

(Reads paragraph 2 of Exhibit FFFF)

Then I do not need to read the next paragraph.

(Reads the next paragraph beginning with words "Thus on the event of the present world war" and ending with the words "total mobilization".)

I stop here to submit to the Court that evidence has been adduced as to the number of Indians in East Asia and the figure mentioned here is more or less what is borne out before the Court.

(Reads rest of the paragraph up to the word 'existence'.)

I will read the last but one paragraph.

(Reads last but one paragraph of Exhibit FFFF beginning with the words "It will be the task of the Provisional Government" and ending with the word "freedom.")

Then follows the signature of the members of the Government. The reason why I called attention to this document is the purpose for which the Provisional Government was formed, and the means by which that Provisional Government intended to carry out its purpose. The fact that it failed to achieve its purpose is entirely irrelevant to the issue before this Court. That is the first fact which we say has been established. The second fact which we say has been established is that it was an organised Government. It does not require many words to establish that proposition. Witnesses have spoken before the Court as to the allocation of duties which appear at the end of the document which I have just read to the Court, and it is also in evidence before the Court that the Indian Independence League became the executive of the Provisional Government which organized, so far as it was possible to do in those warlike conditions, the care of the people who owed allegiance to it. In the month of June 1944, as the evidence is quite clear—it is also in the Exhibit—in Malaya alone, 2,30,000 persons actually took written Oaths of Allegiance to the Government. That was in June 1944, and

it is in evidence that thereafter the process continued. The object of stating the figures is that it was not a case of a Government of what you may call, or what somebody being my opponent may facetiously call, a set of rebels, a desultory sort of crowd of no consequence. I wish to give a lie to that kind of suggestion, and that is the reason why I suggest that the Provisional Government was an organized Government to whom the whole of the two million odd people owed allegiance, and out of whom 2,30,000 persons actually took the Oath of Allegiance in Malaya.

Then, Sir, the next fact which I submit is established before the Court is that this Government was recognized by the Axis powers. I use that expression briefly because it is quite unnecessary either in law or in fact to prove that the recognition must be by a particular number of Governments or by a particular class of Governments. The recognition is proof and more than proof that it had the right to declare war for the purpose for which it 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.

On the question of recognition, I wish to call attention to certain cross-examination by my learned friend. Of course in so far as recognition by Germany or Italy was concerned there could be no cross-examination and none was attempted. But with reference to certain East Asia matters in those days, a suggestion was made that those Governments were under the control of Japan. I for my part, with very great respect, fail to understand the significance of the suggestion. Supposing Japan had an Empire, that is to say succeeded in keeping the territories it conquered without giving them liberty, the recognition would be none the less effective because it makes no difference whether and which Government recognised this particular Government of Free India. The point still remains, and I assert that the recognition is but a proof of what I may call a statehood which gives it the capacity

of declaring and making war for the liberation of its own countrymen. The material point therefore is whether it had attained that degree of statehood which gave it that power. Once you have a State which can and is entitled to declare war, the war itself is its own justification. There is no question that any two independent States have a right to declare war. Any act done in the prosecution of that war is justified by the mere fact of the war itself. Barring this, it may be asked why trials are going on in parts of Asia and elsewhere, and in Germany. In fact they themselves emphasize the truth of the correctness of the proposition that any act done in due prosecution of war cannot be the subject of any municipal court by way of examination. What has hapened is that in addition to the due prosecution of war according to civilised laws, individuals have been guilty of acts outside the pale of civilised warfare, which we popularly call now war crimes. But the very fact that you can only deal with and do deal with war crimes, emphatically and clearly proves that in so far as the normal civilised conduct of war is concerned including the use of an atomic bomb, is outside the pale of examination by way of right or wrong by any municipal tribunal.

Then Sirs, the next fact which I submit is established is that this State had an army which was properly organised, having its own distinctive badges and emblems, functioning under regularly appointed officers. I am obliged to the Prosecution in this matter for I was spared the necessity of having to prove this proposition. They put in document after document to show that the Indian National Army was properly organised. First, that it was regulated by an Indian National Army Act. The only point as far as I could see from the cross-examination which was made was with reference to certain items of corporal punishment. On that it is necessary to point out to the Court that for the moment those who pursue that course forget the course of legislation in Britsih India itself. It is true that Lieut. Nag told the Court that apart from the

Indian Army Act certain provisions relating to corporal punishment were incorporated in the Indian National Army Act. It was probably forgotten that a little while before, in the Indian Army Act were incorporated provisions in Section 45 of that Act, headed "Corporal Punishment." I am reading from Section 45 of the Indian Army Act of 1911:

> "Where any person subject to this Act, and under the rank of warrant officer—
>
> (a) on active service, is guilty of any offence;
>
> or
>
> (b) at any time is guilty of the offence specified in clause (d) of section 31: or
>
> (c) at any time is guilty of a civil offence which would be punishable with whipping under the law of British India, and is triable by court-martial under this Act,

it shall be lawful for a court-martial to award for that offence corporal punishment not exceeding thirty lashes."

It is true that about the time of this war this particular provision was omitted. But it is a mistake to think that a similar provision in the Indian Statute Law did not exist. As a matter of fact, in so far as the Defence of India Act and certain Ordinances are concerned, the provision was definitely made, making corporal punishment as part of the punishment applicable to the personnel of the Indian Army. Ordinance 37 of 1943 practically replaced the provisions of the Indian Army Act which were not found in it; a certain amount of effort was made as if under an Act governing a civilised army corporal punishment was not permissible as against the provisions which were to be found in the Indian National Army Act. I am quite certain that it was done under misapprehension.

The Military Operation Areas Special Powers Ordinance, Part II, Section 22 and 23 read:

"Sec. 22: Whoever commits an offence punishable under Section 121-A, 122, 125 or 131 of the Indian Penal Code (XLV of 1860) may, in lieu of any punishment to which he is liable under the said code, be punished with death.

"Sec. 23: Whoever contravenes any of the provisions of Rule 36 of the Defence of India Rules or is deemed under the provisions of the said Rules to have contravened such provision, may, in lieu of any punishment to which he is liable under the said Rules, be punished with death, or with whipping, in addition to any punishment to which he is liable under the said Rules."

I will be able if necessary to read out all the Rules which clearly show that under the Indian Law, taken as a whole, the punishment with reference to whipping exists, such as the provision which was made in the Indian Army Act. I have got, Sirs, a summary made out of the provisions with reference to whipping which I shall afterwards hand over to the Court. Shortly stated, my submission to the Court is this that the only attack made by the Advocate-General on the making and framing of the Indian National Army Act, was the provision with reference to whipping, and I submit to the Court that that was done under a misapprehension, for it is as much a part, though not technically quite, in the Indian Army Act but in the Defence of India Rules and the Ordinance. It makes no difference. But taking in the aggregate, Indian legislation does sanction corporal punishment throughout the period with which we are concerned and therefore it is that I say and submit to the Court that this was a properly organised army, having a code of its own, which for all practical purposes is the Indian Army Act and any condemnation of the rules under which that army functioned is a condemnation of the Indian Army Act itself, which I submit is not the purpose of the Prosecution in this case. Therefore, we come back, Sirs, to this point that this was an organized army functioning under a civilised code. As

regards the appointment of officers and the regular method by which it was done, as regards the different branches and the functions, you, Sirs, are more competent than myself to judge from the documents which have been placed before you. They are in the shape of army orders or orders of the day and so on, which have been placed before the Court. On a question of fact we have arrived so far that there was a state which declared war for the purpose of fighting for the liberation of the country and it had an organised army, organised under a code which for all practical, substantial purposes, accorded with the aggregate law on the same subject prevailing in British India. I use the word aggregate, because I must bring in the other laws also which provided for and permitted the infliction of corporal punishment in all these cases.

The next fact which is established beyond all dispute was that the object of the declaration of war by the Provisional Government of Free India was the liberation of India.

The next important fact which I think must be mentioned is that the Indian National Army was formed with two purposes. The main purpose was the securing the liberation of India and no doubt, Sirs, from the most important witness that the prosecution called, it has never been difficult to establish that that was the object with which that Army was formed and that was the object with which the individuals who joined it. The other object also was which was somewhat subordinate, but useful purpose, the protection such as could be afforded to the Indian inhabitants of Burma and Malaya, particularly during the days when law and order in those parts of the country was poorly looked after, the lives and the honour and the property of the people was not quite so easily protected.

The first object is the one which the army was called upon to fulfil as a part of its duties. Again taking the evidence as a whole, I submit it has been amply proved

before this Court that the I.N.A. was formed with the object of fighting for the liberation of India and also with the object of protecting the lives, honour and property of people residing in East Asia at that time.

The next point which is established, I submit, is this—though I speak with less confidence because I do not see it admitted—but the fact has been proved and it is my duty to examine the evidence on it, is that the Japanese Government or the Nippon Government as it is called, ceded to the new Indian State the islands of Nicobar and Andamans, that the Indian State acquired territory in the form of Ziawadi, which was about fifty square miles in area, and that it administered for a period of four to six months the Manipur and Vishnupur areas.

As regards the first, in so far as Lieut. Nag was concerned, he has given definite evidence that the two islands were ceded. The evidence falls under three parts: the first is a declaration to that effect by the Japanese Government, announced by a document which has been proved before this Court. That document is a statement by General Tojo that they were about to concede the islands of Andamans and Nicobar to the Free Indian Government. That document is UUUU. (Counsel reads relevant portions of the document): This was on the 5th November 1943.

Then followed events which clearly showed that that purpose was carried out. You have in evidence that that declaration was made and that the new Indian State was called upon to administer it by means of a Commissioner, that a Commissioner was in fact appointed, that the Commissioner in fact went, and you have evidence of a definite ceremony at which the naval and military authorities then in charge handed over the islands to the Commissioner on behalf of the Indian State at Port Blair. These are points on which, as far as I am able to see the evidence, very little criticism has been made by way of cross-examination.

The point on which there has been a difference between the Prosecution and ourselves is the actual form and extent of the administration of the islands. But it is clearly a misconception to confuse the ceding of a territory and taking over every item of administration of that territory, particularly under the conditions then prevailing. The fact is—and it is commonsense I submit—that a house might well be sold and completely sold, sold outright and yet possession for a time may not be wholly given. It is a familiar illustration I am giving, so that it is easy to appreciate. In the somewhat elaborate cross-examination for this purpose of Col. Loganadhan, it was intended merely to point out that the whole of the administration was not taken over—which is not denied—he said it over and over again; and I think it is established and I ask the Court to hold it is established that he went for the purpose of taking over the administration. It is true that he did not take over more than two items—one, education and the fact that the area was small and the people ignorant is hardly an argument that he had not taken over the administration. I dare say in other countries where the standard of literacy is something like 99 percent, there are many more schools than in this unfortunate country where the standard of literacy is probably 15 percent. Therefore the argument that schools were few and the expenditure was so little—I think there is very little point in the cross-examination on this matter. I did enter a protest but it was overruled and it is not for me to say anything more about it. But you do not detract from the cession of a territory in quantity or time by pointing out that the whole of the administration was not and could not be taken over. Colonel Loganadhan told the Court again and again—almost painfully over again—of the fact that until he got complete control of the police in the matter of spies (which seemed to be a sore point with the local inhabitants), he was not prepared to take over any other part of the administration. But there is one significant thing that my learned friend got out of

Colonel Loganadhan, and that is that one of the officers who went with him, administered what you may call very elementary justice which it was possible to do in the conditions then prevailing in the islands. So much so that having asked it and got it, he tried to shake it off but he could not, and it was proved to the hilt that Justice and Education were taken over. True, police was not taken over because the Japanese from the point of view of defence were keen on retaining control over what you may call the spy population of these islands. But one thing remains and that is the most significant fact, and that is the renaming of the islands. So that any amount of examination as to why or how month by month or day by day further acts of administration were not made, cannot possibly get rid of three important facts: first, the clear solemn declaration that the islands would be handed over shortly. A suggestion was made—it remained at a suggestion only—that they would be handed over after the war. Where my friend got the words "after the war" I do not know. I hope he will point it out and that is why I read out this document. The document clearly shows that they were to be very shortly handed over.

The second fact was that it was to be administered through a Commissioner, which was a definite proposition made at that time. A Commissioner was in fact nominated by the Provisional Government and the Commissioner in fact reached there and began to function. No doubt, as in every case of this kind, I presume this Court will take almost judicial notice of the fact as to how Germany and other countries are being administered today. No doubt the man was qualified, and he may book the best educated man from amongst his staff, and he hoped that the local machinery would soon adapt itself for the purpose of continuing the administration, because it is unthinkable that you can transfer quickly and at one stroke the whole administrative machinery from one country to another. Anybody who is familiar with the administration of this very country, is aware that Britain administers this country

through practically the entire machinery of the Indian people themselves. So that the number of men and all the rest of it, I submit, is so much, without any disrespect, hot air. The real point is, were or were not the islands ceded? And I say there is so much evidence that they were.

The last point is the re-naming of the islands: Shahid and Swaraj.

I submit that it is clearly established on the evidence before this court that though by reason of the exigencies of the situation, it may not have been possible to take over the complete administration, in law and in fact the islands were given over to the Indian State, or to what I would call the Provisional Government.

Next I deal with the question of Ziawadi. The position is this, accordance to the evidence on the record: that this was a property, about 50 sq. miles in area, with 15,000 inhabitants who were Indians. It had on it a sugar factory and various other means of production, agricultural or otherwise and every branch of administration of that territory was carried out by men appointed by the Indian National Army and belonging to the Azad Hind Dal.

My learned friend did not even venture, in the course of cross-examination, to challenge the truth of the statements made before this court by witness Shiv Singh and Arshad on this head. Shiv Singh said that every branch of administration was taken over. He gave the names of the person who was the officer in charge of every branch of administration, Revenue, Police, P.W.D., Justice both civil and criminal. Under these circumstances, the legal position is simple. I shall come to it in greater detail afterwards. Japan conquered Burma. By right of conquest it was in a position to dispose as it liked of the whole or any portion of any territory and as the witness told you clearly, by reason of the agreement between the Provisional Government and the Nippon Government, this

territory was handed over as a part of the liberated territory to the I.N.A. and the Azad Hind Dal. At this stage let me point out to the Court that the Azad Hind Dal, it has been proved, was an organization of men trained for the purpose of administering areas as soon as they came under the control or occupation of the I.N.A. or as soon as they were handed over to them. I must also remind the Court that it has been proved beyond question—because as far as I see there was no cross-examination or effective cross-examination any way, that as soon as the I.N.A. crossed the borders of Burma into India a proclamation was issued in two parts, one signed by the Head of the Indian State and the other signed by General Kawabe under the orders of the South Eastern Command. In that it was distinctly stated that any part of the Indian territory which would be acquired by conquest or otherwise by the Japanese Army would be handed over to the I.N.A. for the purpose of forming part of the liberated territory and to be administered by them. That is the history of the ceding.

Then we come to Manipur and Vishnupur areas. Evidence has been given before the Court without any reasonable demur to the effect that during the time the Japanese and the I.N.A. were operating, those portions of India were in fact administered by the I.N.A. through its organization, the Azad Hind Dal, and the area was 15,000 square miles. The duration of administration has no bearing on this issue, for indeed it can happen, as it did happen in this war, that territories were as easily acquired as lost. This Court is not concerned with the question of duration. I would ask the Court to hold that the two islands, Andamans and Nicobar, were in fact ceded, that Ziawadi became a part of liberated Indian territory, and that, though for a short period of time, Manipur and Vishnupur areas were exactly in the same position.

The next point to which I wish to refer is the resources of the State. In order to judge of the existence of the

State, the resources of the State is also one of the matters to be considered. It has been proved before the Court that some 20 crores of rupees were in fact donated to the State, out of which was maintained the civil government and the army. Dina Nath, who impressed this Court, gave extremely clear evidence on this head. He was one of the Directors of the Azad Hind Bank and he told the Court that between Burma and Malaya, during that short period of time, the State had resources to the tune of 20 crores of rupees, in addition to the produce of Ziawadi. It is a remarkable thing to notice that on the reoccupation of Burma and Malaya every single document which was in the possession of this Indian State was found intact. It was amazing. See the monthly reports which the Prosecution was able to produce with reference to the administration of the Andamans and Nicobar! It only emphasizes—and I wish to make a point of this—that there was a complete organisation, and that organisation was as good as could reasonably be expected. That alone accounts for half the documents which my learned friend was able to produce.

The point is that we were a little handicapped owing to the lack of certain documents. As the evidence before the Court shows, this Bank was closed after the occupation of Rangoon, and in fact it is in evidence that some 35 lakhs worth of property was sequestered. I am not complaining of the sequestration. That I think was the right of the conquerors. What I am saying is that in so far as the resources of the State were concerned, they were full and adequate for the purposes which the new State had then in view.

Here I wish to refer to a bulletin. It is not what I might call technical evidence before the Court but it will be my duty to submit that it is a document of which the Court should take judicial notice. The document is dated the 10th November 1945 and called Stamp Collecting.

Sir N. P. Engineer: My learned friend is reading from a document which has not been accepted.

Sri Desai: I am only making a submission to the Court. Is it my friend's contention that if I read a book on law, it should be put in as an exhibit?

Judge-Advocate: The document itself cannot be admitted at this stage.

Sri Desai: All I am doing now is to make a submission to the Court.

Section 57 says:

"The Court shall take judicial notice of the following facts:

"In all these cases and also in all matters of published history, literature, science or art the Court may resort for help to appropriate books or documents of reference."

And if the Learned Advocate-General solemnly suggests that every single book of history, literature, science, and art is to be an exhibit before it can be referred to, I am very sorry that it is a statement which defeats itself.

Judge-Advocate: Mr. Desai, will you read out what you want the Court to take judicial notice of?

Sri Desai: May I not apply that the Court may consider it? All I am asking is that this application be considered. Of course the Court may reject it; I am not suggesting that the Court is bound to accept it. My submission is that under Section 57 it may be taken judicial notice of.

I was referring to an issue of November 10, 1945, of a weekly publication called "Stamp Collecting" published in London and edited by Douglas Armstrong, a well-known philatelist. In that issue at page 136, column 1, the following appears:—

"Imphal Stamp that failed.

"So confident were the Japs that they would occupy Imphal, when they invaded Southern Assam that they actually prepared a special issue of stamps for use there. Needless to say these stamps failed to materialise, but our correspondent, Flying Officer T. A. Broomhead, informs us that he has seen proof impressions in the hands of the man who was responsible for the printing (in Rangoon). Two denominations appear to have been prepared, viz., 3 pice plum and 1 anna red, both in the same design and roughly perforated 11½X9½ (approx.) The subject of the vignette (illustrated) is the old Mogul Fortress at Old Delhi accompanied by the slogan "On to Delhi". Bilingual inscription reads "PROVISIONAL GOVERNMENT OF FREE INDIA". When it became evident that the Imphal stamps would not be required, the dies were destroyed and the bulk supply of sheets printed in readiness was burnt with the exception of a small quantity salvaged by the printer."

At the top corner on the left-hand side is a facsimile of the stamp referred to in the above quotation.

It is submitted that this document should be taken judicial notice of in support 'inter alia' of proof that the Provisional Government of Free India had got prepared, issued or were about to issue postal stamps of that character. As appears from the above quotation, the dies were prepared under the direction of the Japanese.

Counsel for the Prosecution: I submit....

Judge-Advocate: Would it not be more convenient to deal with this point in your arguments, and so shall I. There is no point, when the document is read, whether the Court accepts it or not.

Sri Desai: I frankly submit to the Court that it is not a matter of such an importance, but as the document was brought to my notice I thought it was my duty to

put it before the Court. Nobody should question books of history, science, literature, and art. It is a very accepted magazine in England dealing with this subject, edited by a very well-known man indeed.

Then, Sir, it appears from the evidence that this Indian State had a Civil, and what I may call, an Army Gazette of its own. That is also established before this Court.

On these facts, Sir, the first question of law which I wish to raise is this: Having regard to the condition in which this Free Government of India had been formed and was functioning, it was entitled to make war and it did make war for the purpose of liberating this country. That is the first and the main issue before the Court. This Court is trying civil offences under the Indian Penal Code, and there are two ways of looking at this question. One is that when two States declare a war—and I may assume for the purpose of this argument, because I cannot do more than place evidence before this Court for its acceptance, that the condition in which the new Indian State found itself, it was in a position to declare war—and having declared war, in so far as any acts in the prosecution of that war are concerned, they are outside the pale of municipal law. I will tell you, Sir, what I mean because I will elaborate this sufficiently to make myself understood by the Court. Supposing a German during the prosecution of the war had shot two or three or ten Britishers in England and was found in England, the question is, could he be charged with having committed murder. I submit never, for the simple reason that those acts were done during the due prosecution of the war which, unfortunately, in the present world of infirmities the International Law accepts. That is to say, what International Law accepts is that two independent countries or two States, as they are called, may make war on each other, and those who carry out any action in due prosecution of the war (apart from war criminals) is outside the pale

of municipal law. Alternatively, if that is not sufficient for this Court (though I submit it should be in view of what I am going to read to you from accepted authorities on International Law) under Section 79 of the Indian Penal Code the acts done in due prosecution of the war were not offences. Section 79 of the Indian Penal Code reads thus:

"Nothing is an offence which is done by any person who is justified by law....." And my submission to the Court is that under the term 'law' is covered 'International Law', and for that reason in so far as that German—continuing the example which I was giving—who was arrested in England was concerned, his defence would be: "My country, my State, was at war with your States. Under the orders of my State, and in due prosecution of the war, I did the acts which under ordinary normal circumstances might be offences, but which having regard to the circumstances are no offences at all."

Sir, it is unthinkable that any member of any organized army could be charged with an offence merely because he fought one or ten or a million men belonging to an army of the State with which he is at war. It is perfectly obvious to anybody that during the prosecution of the war, the municipal law relating to that country does not apply, except, I quite agree, when one soldier steals the pocket-book of another soldier. That I appreciate. But the question which we have got to bear in mind is the very important distinction: Was that act done in due prosecution of the war which one State declared upon another.

Once you get to that state, it is perfectly obvious that that municipal law must and is bound to remain in abeyance. It is impossible to arraign any individual for carrying out as a matter of duty acts which might otherwise be offences—killing a man every day, destroying property every day. In fact it is a very part of the war itself. Therefore the agreement is twofold. The alternatives are either

that any act done in due prosecution of war is outside the pale of municipal law—that is why I pointed out to you in the commencement that the charge against these young men before you is not as if they had committed an act of private murder by reason of some private quarrel. The documents accepted by the prosecution clearly bear out that whatever they did, they did as part of the prosecution of war. Remember that always, because without that the law cannot be appreciated with reference to the facts in issue.

But there is another way of looking at it, if you must. That is whether the exception provided by Section 79 is not equally applicable to the case. My submission to the Court is that whether you accept the one or the other makes no difference to the decision that I am asking for as to the immunity from those acts being offences at all; because the very language of Section 79 is: "Nothing is an offence which is justified by law." The Section assumes that in private life it might otherwise have been an offence. If you, gentlemen, in the due prosecution of war committed murders, could the civil laws as propounded by the other side be put into action against you, when in all honour you acted in prosecution of your duties as members of an organised army of a State that had declared war? It stands to reason—and it must—that any act done by a member of an organised army fighting under the orders of one State against another State between which war exists, is an act entirely outside municipal law. But assuming for the purpose of argument, the Court requires some nearer justification. In the eye of the Court, in so far as the administration by this Court is concerned, it is fortunate that I am able to find the exception in the Indian Penal Code itself, because these young men are being charged either under Section 121 or Section 302 of the Indian Penal Code and I am relying on Section 79 of the same Code which says in terms that it is not an offence. Supposing war was declared between two States and when peace time returned every individual soldier is called upon to say

whether he killed so and so. I am quite sure that as I am addressing men of commonsense, you would laugh at the idea. But then I quite agree that I would have to satisfy you that the new Indian State that declared war was entitled to do it in the sense of international law.

And now I will proceed to quote from books of international law on the question of right to make war. I am reading to you Vol. II Pitt-Cobett's Cases in International Law under the heading of "War" 1937 Edition.

"International war is a contest carried on by an armed force either between States or between a State and some community or body which is treated as a State for the purpose of the conduct of hostilities. International war differs from other kinds of war in that it has the effect of setting up a new relation in law both as between the belligerents themselves and as between each of them and the other States. As between the belligerents, the State of war although it departs from normal relations, is nevertheless a State of regulated violence in which the conduct of hostilities is governed by certain principles and rules which rest part on custom and part on convention, and which are sanctioned in the last resort by the action of international society however uncertain may be their operation."

I next call attention to Wheaton's International Law. I am reading Wheaton's "International Law", 1945 edition, Vol. II, page 98:

"War in the absence of any international authority competent to suppress effectively international wrongs has always been held legal by international law."

Remember that as a definite proposition that so long as there are two States, if they declare war against each other, there is no justification required for it. And once you have a war, any person being a member of an organised army or one of the warring States, cannot be called

upon individually to account for the acts, which in civil matters or normal times if done individually in private capacity for private motive, be considered to be an offence.

> "War, in the absence of any international authority competent to suppress effectively international wrongs, has always been held legal by international law..... Even the creation of the League of Nations leaves war in certain cases legal, though there is now on record the unanimous Assembly condemnation of aggressive war. War is essentially a struggle between States, involving the application of force. Mere armed occupation, as in the seizure of Strassburg by Louis XIV in 1680-81 or as in that of Corfu by Italy in 1923, is not war unless the State affected declares it so, and similarly, as regards pacific blockade. The States need not necessarily be fully sovereign: in 1876, Serbia and Montenegro warred on Turkey, though vassal States; in 1877, Rumania followed suit. In 1885, Bulgaria warred on Serbia, then fully sovereign, and in the treaty of peace of March 3, 1886, though Turkey as suzerain took part, Bulgaria appeared independently as a party. So the South African Republic warred on the United Kingdom in 1899...."

So, the first step in the argument is that the State which declares war is and must be in a position to do it. But once it declares war against any other State, then there can be no question of its propriety, justice or right. In the particular case before the Court, and notwithstanding their territories which were occupied, I do say that this war at all events was completely a justified war. International law in the question of war is not static. It is law that has grown from time to time with the progress of civilization.

Therefore the question really is, once it comes to war, there is no question of justification. But hitherto at all events now in the global war a great many events have occurred of which international conscience takes note. I

will read out to you two passages, one from Mr. Winston Churchill from the Hansard and another from Mr. Eden. The position now is that international law has reached this stage that if liberty and democracy are to have any meaning all over the world, and not merely just for a part of it, and this is not politics, it is law—any war made for the purpose of liberating oneself from foreign yoke is completely justified by modern international law. And it will be travesty of justice if we were to be told as the result of any decision arrived at here or otherwise, that the Indian may go as soldier and fight for the freedom of England against Germany, for England against Italy, for England against Japan, and yet a stage may not be reached when a free Indian State may not wish to free itself from any country, including England itself. We maintain that this particular war, according to the decisions, requires no justification. If one State can declare war, then the other State can also declare war and fight, and anything done in its due prosecution has no civil consequences of any kind. In other words, not one of these men now charged before you can be called upon to account for his actions. We can show that they have done nothing outside the scope of the due prosecution of war on a civilized basis. That is an emphasis which I always wish to put. It is not alleged against these men that there was any question about the acts with which they are charged. They were acts carried out in due prosecution of the war, under what you may call civilised rules. Therefore the question before the Court is a very narrow one.

To continue what I was reading:

"A civil war between different members of the same society is, what Grotius calls, a mixed war. It is according to him public on the side of the established Government and private on the part of people resisting its authority. The general usage of nations is as regards such a war as entitling both the contending parties to all the rights of war as against each other

and even as respects neutral nations. It seems to be now settled that it is unnecessary in order to constitute war that both parties should be acknowledged as independent nations or sovereign States."

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. Hence modern international law has now recognised the right of subject races which are not for the time being or at the moment independent, to be so organized, and if they are organised and fight an organised war through an organised army, the individual members of that army are unanswerable before any municipal court for what was done in due prosecution of that war.

It seems to be now settled that it is unnecessary in order to constitute a war that both parties should be acknowledged as independent nations or sovereign States. A war may certainly exist between a State and its suzerain as in the Boer War. May I appeal to this Court and all of you who are familiar with British history,—what about Charles I and his death? What about the Magna Charta? What about James II? It is all recorded in history. In other words, you do reach a stage where the organisation, call it rebel if you like, call it insurgent;—insurgents or rebels may reach a stage of organisation for the purpose of liberating themselves when what they do after declaring war is subject to the laws of war.

"A war may certainly exist between a State and a suzerain as in the Boer War. Moreover, a war may exist where one of the belligerents claims sovereign rights as against the other, whether in a federal or a unitary State...."

But it is quite an unnecessary requisite. If ever a subject race finds itself in a position where its organisation is able to declare war, then acts done by the armies on either side come under this. I put a very simple question: What about the acts of those who fought on the side of the British in this War? They killed lots of people. Would they be put up before this Court under Section 302? Most amazing! It was a properly fought war, no doubt as in other wars one or the other side lost, and the fact that a war is lost has no effect on the immunity from the consequences in acts done in due prosecution of the war. He says further:

> "Whether the struggle is a war or not is to be determined not from the relation of the combatants to each other, but from the mode in which it is carried on. The Government of the State may recognize its subjects as belligerents, in which case other States will normally but need not follow the same course. Or other States may recognize belligerency, in which case the parent State will all but certainly follow suit."

That is the crux of the matter. I quite agree that if ten persons in a village declare war on Britain, they are rebels, and I am not here to justify it. What I am saying is this: in a struggle between two organizations a stage must be reached where the organisation of the State and the organisation of the army are such that it is a war recognised by civilised nations; and if it is once recognised, then the immunity follows. As the books point out, we had the instance of the war between the South and the North of America and you have a declaration from Abraham Lincoln downwards that it was a proper war and there was nothing more to be said about it as soon as the hostilities ceased. It goes on to say:

> "Among the tests are the existence of a de facto political organization of the insurgents sufficient in character, population and resources to constitute it, if left to itself, a State among nations capable of dis-

charging the duties of a State; the actual employment of military forces on each side acting in accordance with the rules and customs of war....If all these elements exist, the condition of things is undoubtedly war; and it may be war before they are all ripened into activity."

Therefore what I wish to say is this: that the test by which you will judge this case is, have we or have we not proved the existence of a de facto political organization of insurgents? I do not deny that they were insurgents. Apart from the other question to which I shall come presently, I will assume against myself that the people who declared war and who declared the Provisional Government of Free India were a set of insurgents, a set of rebels —I will assume that against myself.

"As President Grant said in his message of June 13, 1870: 'The question of belligerency is one of fact not to be decided by sympathies for or prejudices against either party. The relations between the parent State and the insurgents must amount, in fact, to war in the sense of international law'."

I call upon you to do the same. It is not a question of prejudice; it is not a question of prestige or what happens to the Army, to this or the other person. Please remember that you are here as judges; you are not politicians, I agree, and I do not want you to be such. If you find that there is a de facto political organization sufficient in numbers, sufficient in character and sufficient in resources to constitute itself capable of declaring and making war with an organised army, your verdict must be in favour of these men—no more and no less than the verdict on your own men for killing others, of which act you are justly proud.

That is the position in law.

Then I wish to call attention to another book on International Law—an accepted book and what is more, it is

borne out by all the earlier cases in which war was waged by what you may call insurgents against their own sovereign, if you must use that expression. This book is by Lawrence—page 309. The whole question before the Court under this particular head is whether or not there was a properly declared war in prosecution of which the accused before you did the acts which they did. And if they did that in due prosecution of that war, then there can be no question of any civil offence, as I think all of you in your own person will easily realise. I am not obliged in my civil life to kill anybody except on pain of conviction, but you are.

Lawrence says:

> "War may be defined as a contest carried on by public force between states, or between states and communities having with regard to the contest the rights of states, the parties to it having the intention of ending peaceful relations, and substituting for them those of hostility with all the legal incidents thereof."

These were no private acts done with a private motive or done for private individual benefit. They came to be done by them as members of an organised army, having declared war and the law says to them that no such consequences as the government demands can arise. Lawrence goes on:

> "It is true that two States are said to be at war as soon as one of them has received a declaration of war from the other."

Here there was in fact a formal declaration of war. Then I call attention to a well-known work of Oppenheim on International Law. Oppenheim was Professor of International Law at Cambridge University. He says this—(Vol. II. page 166):

> "War is a contention between two or more armed forces through their armed forces for the purpose of over-

powering each other....War is a fact recognised, and with regard to many points, regulated but not established by International Law."

Once you get to the stage of war, naturally it is the primary purpose of each party to overpower the other. Therefore in due prosecution of it, acts which might be called offences under civil law are not offences: the very purpose is to destroy men and property: the very thing which would otherwise be unlawful becomes right, becomes patriotic, becomes a duty.

"In any case it is universally recognised that war is a contention, i.e., a violent struggle through the application of armed force....

To be war, the contention must be between States ....On the other hand, to an armed contention between a suzerain and its vassal State the character of war ought not to be denied, for both parties are States, although the action of the vassal may, from the standpoint of constitutional law, be rebellion." (Para 56).

I have already said that states are those which have the right to make war **like States.**

The first proposition for which I stand before this Court is this, that the two States sufficient in number, in organisation and in resources may make war against each other. That is the proposition to which I stand, and if they made war against each other, then there is complete immunity for what might otherwise be a private offence. That must necessarily follow from the acceptance of war as a necessary evil in this infirm world, and no individual member can be called upon to answer for the consequences of his acts so long as it is properly declared war. I shall call the Court's attention to Mr. Hyde's book on 'International Law.' Vol. III, page 1792, para 648.

"So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a

belligerent; his killing, wounding or other war like acts are not individual crimes or offences. No belligerent has a right to declare that enemies of a certain class, colour or condition, when properly organised as soldiers, will not be treated by him as public enemies."

In other words the position is simple. Any act done by members of an armed force against any opponent, which in ordinary times in a personal case would be a civil offence, ceases to be an offence altogether. Otherwise, war and recognition is not a possibility.

There is a very important decision of the Federal Court of the United States expressing the same thing. I may be pardoned for multiplying authorities, but I do so because I feel that instead of paraphrasing the idea myself, if I do it through the medium of an accepted authority, I might be able to carry better conviction. It is Vol. 168 United States Reports, page 250. It is the case of Underhill v. Hernandez. I am reading the judgment of Chief Justice Fuller. The opinion of the Court is as follows:

"Nor can the principle be confined to lawful or recognised Governments or to cases where redress can manifestly be had through public channels. The immunity of individuals from suits brought in foreign tribunals for acts done within their own States in the exercise of Governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as a matter of fact. Where a civil war prevails, that is, where the people of a country are divided into two hostile parties, who take up arms and oppose one another by military force, generally speaking foreign nations do not assume to judge of the merits of the quarrel. If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognised, then the acts of such government from the commencement of its existence are regarded as those of an inde-

pendent nation. If the political revolt fails of success, still if actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability."

Chief Justice Fuller was deciding the case arising out of the war between the North and the South. A war might exist between what you might call an existing State and insurgents, and yet the insurgents, as they were called by the Federal Government, may have such organisation, force and strength that the relation between the two parties is one of the existence of war. Once the war exists, what is the legal position? If the party seeking to dislodge the existing Government succeeds, it is now accepted law that a successful rebellion is a Government established by law. The question is—what is the position in case of an unsuccessful rebellion. The law is, I submit, that if the stage is reached where the rebels or insurgents are sufficiently organised and are sufficiently resourceful to make war, then it is entitled to be regarded as war, and there will be no individual consequences to persons who take part in it. If actual war has been waged, and my learned friend himself was at pains to prove that a regular war was being waged, and he put forward document after document to prove it, then the question is: What is the distinction between a private individual waging war on his own and his waging war as a member of a force or organised State. That is the real distinction which makes one immune from the consequences. If actual war has been waged, then acts of legitimate warfare cannot be made the basis of individual liability.

There is another case belonging to the same period. It is Ford v. Surget, 97 United States Reports, page 594, (equal to 24 Law F.D.):

"The Confederate Government can be regarded by the Courts in no other light than as simply the military representative of the insurrection against the military authority of the United States.

"To the Confederate Army was however conceded, in the interest of humanity and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged, under the laws of nations, to the armies of independent Governments engaged in war against each other; that concession placing the soldiers and officers of the rebel army; as to all matters directly connected with the mode of prosecuting the war on the footing of those engaged in lawful war and exempting them from liability for acts of legitimate warfare."

The first proposition is this that in view of the fact that a state of war existed between the Provisional Government of Azad Hind and the British, any act done in prosecution of that war has not the consequences which the Crown claims or might have claimed in the case of a private individual.

In International Law it is permissible for those who are subject to a foreign authority to organise themselves, and having reached that stage of reorganisation and having an organised army to fight for liberation, whether it is successful or not, during the process while the war is being carried on, there is immunity, so far as individual members of the organised army are concerned for all acts done in due prosecution of war on a civilised basis (other than war crimes like those which are the subject of trial now in different parts of the world). That being so, my submission is that the accused men before you are entitled to be declared innocent in that there is no civil or criminal responsibility for those acts. In terms of the language of the books on law, the liability is on the State under whose direction they fought, and such liability in international law on the cessation of hostilities does not exist. Of course if a rebellion is successful, then it becomes a new Government, and there is the end of it and there will be no tribunals, but it is only in a case in which it is not successful that the question arises and the answer is given in my clients' favour by international law.

The next point to which I wish to advert is the alternative point which I made under Section 79 of the Indian Penal Code. The issue which arises apart from the Indian Penal Code is an issue of great international importance. It has arisen, if I may say so, in its actual form for the first time though the authorities directly or indirectly support the principles on which my contention is based. At the same time, appearing before this Tribunal, it becomes my duty to justify it on what I may call a narrower ground to the extent to which it is necessary, for I do feel that before a Tribunal constituted as this is, it is equally important that I should put myself within the narrow sphere of the Indian Statute itself. Then I submit, assuming my submissions are correct and accepted, the hands of the Tribunal are fairly strengthened. The words which I referred to in Section 79 of the Indian Penal Code are 'justified by law'. The question is what is the meaning of the word 'law' appearing in Section 79 of the Indian Penal Code. If I can satisfy this Court that the law there comprehends and includes international law, I submit my Honourable Friend on the other side would have hardly any case to present to the Court at all. If the word 'law' in Section 79 includes International Law so far as the immunity which I have described before is concerned, then I submit the three men at your bar are entitled to plead that they were so justified in the actions which in ordinary private personal life might have been offences under the Indian Penal Code. I wish to call your attention to a certain number of authorities on the question. The first authority to which I call your attention is Blackstone's Commentaries in Book IV, but it is Volume II in this binding. It is accepted at all events by British lawyers that Blackstone's Commentaries are the fountain-source of Common Law of England and it is a matter which I wish to particularly assert before this Court. The page that I am reading is 2237 (Vol. II, edited by W. C. Jones). Most of us who are not lawyers are familiar with Blackstone's Commentaries and know that he is father, to a very large extent, of Common Law. Blackstone's Commen-

taries are relied upon British Courts as a very authoritative exposition of the law on the particular question which he has dealt with.

> "In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land."

So that, as soon as the Court has ascertained what is the international law on a particular point before the Court, it is the bounden duty of the Court to administer that part of International Law as a part of the law of the land, and hence it is that I am submitting to the Court that the word 'law' in Section 79 should be given that extensive meaning which the law has by the Common Law of England.

The next work on which I rely for the purpose of the meaning of the word 'law', meaning thereby that 'nothing is an offence which is justified by law,' is Oppenheim's International Law. The question is what is law, and it is in support of that that I am submitting next Oppenheim's International Law Vol. I, Fifth Edition, page 36, article 21a:

> "In view of this wide divergence of doctrine it is necessary to inquire into the actual legal position in the principal countries in the matter of International Law and Municipal Law.
>
> (1) As regards Great Britain, the following points must be noted:
>
> (a) All such rules of customary International Law as are either universally recognised or have at any rate received the assent of this country are 'per se' part of the law of the land. To that

extent there is still valid in England the Common Law doctrine, to which Blackstone gave expression in a striking passage, that the Law of Nations is part of the law of the land. It has repeatedly been acted upon by Courts. Apart from isolated 'obiter dicta' it has never been denied by judges. The unshaken continuity of its observance suffered a reverse as the result of the dicta of some judges in The Franconia Case in 1876, but West Rand Central Gold Mining Co. v. The King decided in 1905, must be regarded as a reaffirmation of the classical doctrine."

So that, ever since the time of Blackstone, until the last edition of Oppenheim, which belongs to the year 1937, there has never been any question that on any issue in which the doctrine of international law is accepted to be the international law, it becomes a part of the law of the land, law of the land in England, and law of the land here.

Next, I call attention to the work of an American Jurist Hershey on International Public Law and Organisation, page 14, 1927 Edition:

"International Law is a part of our law, and must be ascertained and admitted by the Court of Justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the custom and usages of civilised nations; and, as evidence of these, to the works of jurists and commentators who, by years of labour, research, and experience, have made themselves peculiarly well-acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

So, you will see from this quotation which has come from Justice Gray in the case which is cited—195 United States Reports, page 113 at page 163, that it has been accepted that while administering justice it is your bounden duty to find out, recognise and apply the principles of international law where a person at your bar seeks justice on the ground that the act with which he is charged is an act justified by law and that for the purpose of ascertaining it you may have resort as it is stated by the learned Judge himself to "the usages and customs of civilised nations, and as evidence to this to the work, of jurists, commentators, who by years of labours research and experience have made themselves peculiarly well-acquainted with the subject of which they treat."

Therefore I plead that when the time comes for your deliberation you will carefully, of which I have no doubt, and diligently, of which I am perfectly conscious, study and apply your mind to the citations which I have already given and which I am about to give. Because according to the well-accepted cannons, the commentators who by years of labour, research and experience have made themselves peculiarly well-acquainted with the subjects of which they treat, and such works are restored to and have to be restored to by judicial tribunals. I have got, Sirs, the original judgment from which this quotation is given. The judgment is reported in 175 United States Reports in the judgment at page 700. The case is Paquet Habana, Appeals from the District Courts of the United States for Southern Districts of Florida. The judgment of Mr. Justice Gray on this question is to be found at page 700. I do not wish to read it again, because I have already read it from the textbook in which it is now accepted. At the same time I may be pardoned for pressing this point upon the Court because then the issue before this Court becomes exceedingly narrow. If I am able to persuade this Court, as I submit I hope to do, that in administering the law you are bound to have regard to international law, there will be no difficulty whatever in the way of the defence which I am

presenting. Then the Statute law has made it incumbent upon you, and in fact has declared that nothing is an offence which is justified by law. If therefore the acts which are said to be offences are declared not to be offences, and if I am able to show that the law so declares them, then it will be your duty to declare that, notwithstanding apparent confusion of thought, words like treason and so on, will have no value.

The law of treason in India is codified. It is to be found in Chapter VI of the I.P.C. (Offences against the State) in Sec. 121 and following Sections. Therefore let me caution the Court against the general use of words like "treason." The question is whether my clients who have been charged under Sections 121 and 302 have or have not, in doing those acts, been justified by law, i.e., the law of nations, and if they are so justified the law of this country declares that it is not an offence. In other words the law of this country recognises that there may be acts which if done in private life for private motive might be an offence but which in public life or public duty are not an offence. A Judge is not liable as an abettor of murder because he orders a man to be hung, because he is justified by law. Similarly and equally, if not more emphatically, the member of an armed force having declared war, if during the state of that war he has committed acts which in private life might be offences, the law says nothing shall be an offence. Therefore I do wish in so far as in me lies, to press this point upon your attention, because the first line of argument which I submitted to the Court stands, and I submit to the Court that is the law. In other words the law is that in the prosecution of war the acts which take place are beyond municipal law But assuming for the purpose of argument I have to take my stand on a narrower ground. Then the law of this country, the Indian Statute Law itself enjoins upon you that if I can show justification by means of international law for those acts, then my clients are entitled to a verdict in their favour. I say this to you in the language of one of your greatest

poets that if in so far as God grants me the tongue of persuasion and you the ears of hearing, I have not the least doubt that when you have considered the cases before you, you will have no difficulty or hesitation to decide in my favour on that narrow ground.

The next point to which I wish to call attention is Moore's International Law and Digest, page 2, Vol. I, and this is how it is stated:

> "It is thus apparent that from the beginning the scene in question denoted something more than the positive legislation of independent States and the term international law which has in recent times so generally superseded the earlier titles served to emphasise his fact. It donotes a body of obligations which is in a sense independent of and superior to such legislation. The Government of the United States has on various occasions announced the principle that international law as a system is binding upon nations, not merely as something which they may be tacitly assumed to agree but also as a fundamental condition for their admission to the full and equal participation in the intercourse of civilised nations."

I therefore cannot more emphatically assert than the ground on which I appear before the Court and I have no doubt that it will rise superior (in the language of one of the cases that I read) to all question of prejudice and come to the right conclusion in considering Section 79 and the immunity granted by it.

Just one more passage to which I wish to call attention. It is the judgment of the Privy Council on this question. The last under these heads is a judgment of their Lordships of the Privy Council, reported in a recent number, 1939 appeal cases, page 168. There a question of international law arose. The name of the case is Chang Chi Chu. It was a case of murder committed on a Chinese ship and that is how the question arose of the liability of the prisoner to be tried. And the question arose to what

extent in international law it was necessary to consider whether the prisoner was liable. The contention shortly stated was that the Chinese ship was so much floating Chinese territory. That was the claim made under the international law. Their Lordships of the Privy Council held that under international law it is probably not correct to say that a floating ship of foreign power is so much, what you may call, island foreign territory. But they have ruled by reason of the respect accorded to commity of nations, that anything that occurs on a foreign ship is not within the authority or jurisdiction of municipal law. In this particular case what they held was that in as much as the ship itself accepted the authority of the power which was exercising authority in those waters, they held it became an exception. But in considering the applicability of international law to the question whether or not the Court of jurisdiction to try this particular Chinaman, the question arose to what extent international law has to be considered and the judgment of Their Lordships delivered by Lord Aitkins is very important from this point of view. I would not enter into the question of details which arose in that case though by themselves they are interesting enough. But I may say this that the observations which I propose to read are necessary and essential because the whole defence to the charge of murder, and the want of jurisdiction of the Court, were based on the ground that under international law the Court had no jurisdiction and for that purpose the Court went into the question of what was the appropriate international law on the question. Their Lordships said with reference to the necessity of the application, or rather with reference to the obligation to ascertain and apply international law ourselves was a part of the law. That is how that part of the case is stated.

> Page 167: "Their Lordships entertain no doubt that the law is the correct conclusion, namely that a ship is not so much floating part of a foreign territory, but that immunity is granted for whatever happens in

that ship in so far as jurisdiction is concerned. It more accurately and logically represents the agreement of nations which constitute international law, and alone is consistent with the paramount necessity expressed in general terms for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries."

It must always be remembered that in so far as, at any rate, the courts of this country are concerned, international law has validity in so far as its principles are accepted and adopted by domestic law. There is no external power that imposes its rules upon our code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law so far as it is not inconsistent with the rules enacted by any Statute or finally declared by their tribunals. What then are the immunities of public ships of other nations accepted by our courts and on what principle? I say that in this particular case not only there is no Statute to the contrary, but in fact the Statute imposes that obligation, coming back to the action of Section 79, viz., nothing is an offence which is justified by law. Therefore what you have got to do, Sirs, is to ascertain the relevant body of international law, and having done so, apply it to what is described as domestic law: Therefore there can be no reasonable doubt that in the construction and application of Section 79 the submission which I have already made on the immunity of individual members of an armed force fighting in a war properly declared, that immunity is a part of international law and therefore is a part of national law. And I submit that your own experience whenever emergencies of war have arisen should bear ample testimony to that position. Each time a soldier fights under the orders of a state in a war properly declared, if he were to consider what would be his liabilities, I am afraid the efficiency of war

would be a very difficult process indeed. It is an assumed part of the law of nations that once you become a member of a fighting force of a properly qualified State entitled to make a war, there is an end of all individual liability for the acts which if they were private acts for a private purpose might be an offence within the law. Though according to my submission the first is an essentially correct ground, in any case the justification by law is a sure ground on which I stand before this Court. Hence I submit that nothing is an offence which is justified by law, and I therefore say that the acts with which the accused are charged before the Court are justified by law, that is to say by the international law, and therefore, there can be no question of a personal or individual liability.

This question has been considered in a different form or perhaps in different language because I wish to point out to you, as you have seen in the earlier works to which I referred, the law of war is often described as the law of belligerency. I wish to point out to the Court, as I shall presently do, what is the law of belligerency; in other words, who are entitled to be treated as belligerents in the light of international, and what I may call, municipal or domestic law.

For that purpose I wish to call attention to the authorities which clearly show where and how the law of belligerency rests. I again refer you to Oppenheim on International Law, 1944 edition, Vol. II: he was professor of international law at Cambridge and falls within the description which I gave of men who have by their labour and research and experience and knowledge, contributed to the formulation of international law on many questions. The present question is dealt with on page 200—Article 76A:

> "Recognition of belligerents by other states is not as a rule binding upon the State. Notwithstanding such recognition, it is entitled to treat the insurgents as traitors; but the position is controversial with regard to recognition as a belligerent power granted to

separate armies which comprise subjects of the enemy who are fighting to free their nation from this rule and which are responsible to an authority recognised as representing the nation in question."

That really epitomises the whole of the issue—"but the position is controversial with regard to the recognition as a belligerent power granted to separate armies which comprise subjects of the enemy who are fighting to free their nation from this rule and which are responsible to an authority recognised as representing the nation in question."

To translate it according to law, the accused before you were members of an army responsible to the Provisional Government of Free India, fighting to liberate themselves from the rule of the army of those who were fighting against them, and I submit that is precisely the case before us. The author goes on and gives instances of cases of that kind, and I want to draw your particular attention to those historical instances which fortunately have occurred before, so that I stand before you on much more solid ground than if this were perhaps actually the first instance:

"Thus, in the year 1918, during the world war, Great Britain, France, Italy and the United States of America recognised Czecho-Slovaks as co-belligerents. Similar recognition was granted in the year 1917 to the Polish National Army, composed to a substantial degree of the subjects of the enemy powers. It has been maintained that as in the case of insurgents in a civil war—(quotations of which I have already given)—the enemy is entitled to disregard such recognition and treat the members of the insurgent army when they fall into his hands, in accordance with the provisions of the criminal law. The better opinion is probably that when such recognition is granted by an adversary to large bodies of men effectively organised on foreign soil in anticipation of independent nation-

hood, a point is reached at which the belligerent, confronted with disaffection and desertion of a considerable number of his subjects engaged in hostilities against him, can no longer, without exposing himself to justifiable retaliation, assert the provisions of his own criminal law as the only legally relevant element in the situation."

I want to draw your attention pointedly to the conditions which are here laid down and which, I submit, we have more than amply fulfilled. I ask this Court to declare that that is the better opinion, and I do say that we have reached a stage far in advance of the illustration given by Oppenheim. In this case not merely men were effectively organised, but there was a regularly organised army. This has been amply proved by the Prosecution—thanks to them for that. They have amply proved that there was a regular army, a properly organised army—on foreign soil it is true—but with this added qualification in my favour, that Indians residing in places where the army was organised, numbering not a few hundreds, even a few thousands, but two million men and women and children, through 2,30,000 adult men and women swearing allegiance to that Provisional Government, for the purpose of liberating their country—which unfortunately failed, but none the less the condition required that you may at your peril call to aid the criminal law of the country against such an organisation—effectively organised on foreign soil in anticipation of an independent nationhood. It is true—and that is why I read the Proclamation to this court—I read it with a view to show to you that the object with which on foreign soil an independent government was formed was with the object of liberation of their country: It was undoubtedly in anticipation of independent statehood; and of course if the independent state had been established by the successful prosecution of force, as I said, this tribunal would not have been there to try them. It was because it was done in anticipation, which failed, and which does not detract from the point, that a stage is

reached in which a belligerent confronted with the disaffection and desertion of a considerable number of his subjects engaged in hostilities against him, can no longer assert the provisions of his own criminal law as the only legally relevant element in this situation. In other words, the legally relevant element in this situation is that we, meaning the two armies, had reached a stage where, having reached a stage of war—there can be no question at all that under Section 79 we are entitled to the justification which the laws of war give to belligerent armies. And that no acts done during the course of the prosecution of the war are matters of what you may call domestic law, pure and simple; which would be as if any one of these three accused went and did any of these acts out of private motive. Therefore, it is essential to remember that in all these cases the substance of the law is this: two independent states can always make war and the members of their combatant forces are unanswerable for their acts. Only the question arises, or the intermediate stage arises, whether without having reached the stage of independent statehood (to take the words of Oppenheim) you have attained a stage, and whether having founded a state for the purpose of liberating your own country, you are so organised, both the state and the army, that it assumes the proportions of a state and as a result of the war—as much a war between two independent states. I am pleading before you that we have proved before this court, and the documents which otherwise we would not have had the benefit of and have generously been produced by the prosecution all of them distinctly and clearly showed that we had reached that stage and this court would not only be justified but I submit, bound in law and in conscience to regard the accused as belonging to that organisation, and as member of such belligerent army they are entitled to all the privileges of the laws of war. In other words, immunity for personal acts carried out in due prosecution of the war, as you yourself in your own person would claim.

The next book to which I would call attention, is the British Year Book of International Law, 1937, page 18. It says:

> "What we call belligerent recognition is not so much recognition, even temporary and provisional, of a new government, as the recognition of the existence of a war."

I may explain what is meant here, because the recognition comes as a stage when it has not yet succeeded in establishing its own government. Of course, if for instance perchance this very army had succeeded in its aim, as the maxim of international law is, the successful revolution is the government established by law. But earlier than that there is the stage at which it is in a state of war and that is all that is necessary for the purposes of my case. If I can establish that they were making war, which is regarded as a stage of belligerency by international law, there are entitled to the same privileges and immunities as would be accorded to the armies of two independent nations. It continues:

> "The existence of war is purely a question of fact; but if we recognise the fact that a war is being carried on, then the recognition of the insurgent government follows as a necessary consequence. Wars can only be carried on by governments, and there must be at least two parties to every war. Much of the confusion which obscures the current discussion of the Spanish problem arises from the failure to observe this correct logical consequence. The true doctrine is that recognition of the insurgent government is the necessary and logical consequence of recognising the fact of war."

Therefore I submit that once you recognise, as I submit this court is bound to do on the evidence before it, that there was a regular properly declared and properly prosecuted war, then I submit there can be no quesion that the acts of these men, done in due prosecution of that war,

are completely justified by international law and therefore by law.

The instances are given in the Year Book of International Law. This is what it says:

> "Lest this should seem to be merely doctrinaire, that is the kind of criticism with which we people are sometimes apt to run away,—and theoretical opinion, I shall try to fortify my doctrine by authority. In 1828 Don Miguel, the Pretender to the throne of Portugual was carrying on war by sea and land against his niece and nominal fiancee the child-Queen Donna Maria, who was recognised by Great Britain and other powers as the legitimate sovereign of Portugal. At no time during the struggle was Don Miguel ever recognised by Great Britain under any form 'de jure' or 'de facto.' In 1828 he proclaimed naval blockades of Oporto and of the Azores. These blockades were notified to the British Government which published the notices in the London Gazette and communicated them to the committee of Lloyd's. The King's Advocate Sir Herbert Jenner advised the British Government that the blockades, if effectively maintained, might be recognised as valid, although no form of recognition had at any time been conceded to Don Miguel."

In other words the distinction that is sought to be made is that you may recognise the state of belligerency without necessarily recognising the State.

Refusal to recognise the blockade, so Jenner advised, would be a departure from the neutrality which this country had professed in the civil war. Twenty years later the Palmerston Government, following the advice of Sir John Dodson—and I hope the Judge Advocate will advise you accordingly—then the Queen's Advocate decided to recognise the blockade of Trieste by the Italian insurgents during the Revolution of 1848, although there had been no other act of recognition of the insurgent government.

The point I am trying to emphasise is this that you need not necessarily recognise your opponent as a government, and yet during the course of the war, once you recognise that it was a proper state of belligerency, then the immunities and privileges which I described before follow, because the men, and in modern times the women, who are fighting for the insurgent government are recognised for the purpose of these immunities. It goes on:

"Upon the point which we are now discussing Dodson's opinion is very clear. 'It is sufficient' he says 'to justify a blockade if duly maintained that a 'de facto' war is carried on by Sardinia and Venice on one side and Austria on the other'."

Even more clear is the opinion of a later Queen's Advocate Sir John Harding when advising the Government in 1860 upon the question raised by Garibaldi's rebellion. This is perhaps nearer in its application. This is the quotation from the opinion of Harding:

> "If Her Majesty's Government considers that a civil war actually exists between the dictatorial Government of Southern Italy and that of His Majesty the King of the two Sicilies in which Great Britain is to be strictly neutral and that the dictatorial government has in fact attained (howsoever) an independent and sovereign existence and governs 'de facto' a portion of the Neapolitan dominions, then Her Majesty's Government may without violating or disregarding the law of Nations and without encouraging piracy, so far recognise the acts of this 'de facto' government as to admit the validity of an effective blockade, maintained by a competent naval force acting under its orders, or to acquiesce in the capture and condemnation by it of articles of contraband of war designed for the use of the King of the two Sicilies."

The belligerency which existed was between what you might call the King of Italy and the insurgents, and the advice of Sir John Harding was that if there was a 'de

facto' war between the two, then the rights of the belligerents should be accepted and acknowledged. In other words, supposing they took as prize of war ships belonging to what you might call the constituted King of Italy, it would still be a perfectly good prize.

In the course of the same opinion, Harding pointed out that Garibaldi and his officers could not possibly be regarded as pirates, since they were carrying on war in a regular manner and had been dealt with on equal terms by British naval officers. The three opinions which I have just cited are those of British law officers ranging over the period from 1828 to 1860.

Without further multiplying citations, I will therefore summarise their effect by saying that what we recognise in these cases is the existence of war. The recognition of the insurgent government is merely incidental or consequential since a war implies the existence of some independent authority which carries on the war.

The next thing to which I wish to call your attention, is the recognition this matter has received from the British Government through the then Foreign Secretary Mr. Eden. I am reading from the Hansard which is the recognised report of the Debates of the House of Commons. I am reading from the debates of the 14th April 1937, page 1133. This is what I have here:

"The Leader of the Opposition spoke earlier today as though the Government had given something up in this case. Of course we have not given anything up, because you can never grant belligerent rights to one side only: they must be granted to both sides, if they are granted at all."

This issue arose on the question of the Spanish war.

"The Honourable Gentleman remarked that he thought that never in history had there been any question of granting belligerent rights early in a dispute. As a matter of

fact, in the American Civil War we did grant belligerent rights within six weeks of the outbreak of the Civil War."

"Mr. Noel Baker said: The Government themselves declared a blockade, which as all international lawyers will agree, compels them to grant belligerent rights to both sides."

"Mr. Eden: We ourselves made, in point of fact, a declaration of neutrality out of which arose the granting of belligerent rights to both sides. That is what we did in the American Civil War. Of course that does not stand alone. It is not the only example. The Honourable gentleman is probably familiar. I think, as I know something of his association in this respect, with the Greek rebellion against Turkey in 1821-25. At that time also—remember that in each case these were insurgents against their parent State fighting for their liberation, and it was during the course of that struggle that the rights of belligerents were granted by Britain. At that time also, belligerent rights were granted and His Majesty's Government voiced this opinion to which I would draw the attention of the House; the character of belligerency was not so much a principle as a fact that a certain degree of force and consistency acquired by any mass of population engaged in war entitled that population to be treated as a belligerent and even if this title were questionable, rendered in the interest well-understood of all civilised nations so to treat them."

The position of British politicians and British law on the question of the recognition of belligerency even as between what I might call the parent state and the rebel states has always been recognition of belligerency.

At that time Canning was Foreign Secretary of this country and Professor Philips in his History of Europe deals with this very interesting chapter of modern Greek independence. He says:

"Curiously enough as in the affairs of Spain, so now his (Canning's) attitude was frankly based upon the inte-

rests of England. The interests of England in his opinion demanded peace....The recognition of the belligerent character of the Greeks was necessitated by the impossibility of treating as pirates a population of a million souls and of bringing within the bounds of civilised war a contest which had been marked at the out-set on both sides, by disgusting barbarities.

"Those were both cases in which belligerent rights were granted. A third and perhaps, in a way, even more remarkable case, was the revolt of the Spanish American Colonies against the Spanish Government, from which resulted the establishment of the South American independent republics as we know them today."

So that you have instances on both sides of the line. You have instances where those who rebelled against a State for their own independence ultimately succeeded, but while they were in a state of war both were recognised as belligerents. Those others in which they did not succeed but nonetheless during the interval of the struggle, they were both recognised as belligerents.

> "A third, and perhaps, in a way, even more remarkable case was the revolt of the Spanish American Colonies against the Spanish Government, from which resulted the establishment of the South American independent Republics as we know them today. In that dispute we recognised the rights of the belligerent colonies...."

People were actually revolting against their own Government for their own freedom, and one need not be apologetic in this period of world history to say that the subject race may free itself.

> "In that dispute we recognised the rights of the belligerent colonies long before we recognised them in any other way, and, when I heard the Right Hon. Gentlemen below the Gangway speaking earlier this afternoon, I bethought me that he might well have

remembered the enthusiasm shown by the Liberal Party of that day for those new States across the Atlantic to whom we accorded belligerent rights, though they were rebels against their own mother country."

Sir, I say that I could not quote a stronger authority for your adoption than the action of the British Government as stated authoritatively by the Foreign Secretary of Britain and I would like to read it again in order that I may not miss the point:

> "I bethought me that he might well have remembered the enthusiasm shown by the Liberal Party of that day for those new States across the Atlantic to whom we accorded belligerent rights, though they were rebels against their own mother country."

And I say that the same point arises for you. It is true that those who fought were rebels from the point of view of constitutional law as against their own King—and later on I will come to the question of allegiance—it will be my duty to analyse before you what that means, though it is irrelevant to the issue as I shall point out. The very fact that those colonies were fighting against their mother country as it is called, shows that at that time there was what you may call 'legal allegiance', but legal allegiance cannot be a matter of perpetuity because if it becomes a matter of perpetuity no subject race will ever attain freedom. For the moment, the point with which we are concerned is merely this: that while in a state of belligerency Britain recognised the rebels as proper belligerents, those who were fighting against their mother country, and if that belligerency is recognised, I venture to submit it will be far too much to ask this Court to refuse it to this Provisional Government of Free India and the Armies fighting under them. Mr. Eden goes on—because he wanted to make the point that the State will be recognised not only when it comes into existence, but while still the struggle goes on. Now I read:

"What I wish to deduce from these three examples is that the natural thing...."

mark the words—

"....when a struggle has reached the large dimensions of the present war in Spain, would have been to recognise its belligerent character, and for States whose maritime interests are involved, as ours are, to grant belligerent rights to both sides."

In other words, as he put it before, it is essentially a matter of fact. If we find that the struggle,—call it rebellion, call it insurgence, call it what you like,—has reached such proportions that you cannot control it by normal means, then you must recognise that it is a state of war, and once you recognise that it is a state of war, those who fight in pursuance of the declaration of war and in prosecution of it are entitled to all the rights of belligerency. Then he goes on:

"That would have been the natural thing to do. Recognition of belligerency is, of course, quite distinct from recognising anyone to whom you give belligerent rights as being the legitimate Government of the country."

And that is what I want to impress upon you, that if it is asserted on the other side that it is required for the purpose of immunity from all acts done in due prosecution of the war that the Provisional Government should have been recognised by Britain, it is a completely futile argument. In fact, the very hypothesis cannot exist. The hypothesis is this: The rebels as I have called them—I do not mind it—are fighting for their freedom against another country. If they succeed, the Government will be recognised, but in the meantime, during the course of fighting, the Government won't be recognised, but what is recognised is belligerency. I shall presently point out what it involves,—immunity from all acts done in due prosecution of the war.

"Recognition of belligerency is, of couse, quite distinct from recognising anyone to whom you gave belligerent rights as being the legitimate Government of the country."

It is a fact that the Provisional Government was not then and did not become the actual Government of India, but that does not matter at all. What are the rights and privileges during the course of the struggle, and if I am right in my submission to the Court, there can be no doubt that during the course of struggle there was only one duty owed by men like the accused before you, and that is to prosecute that war under the orders of the Provisional Government,—and anything that they did by way of prosecuting that war gives them complete immunity.

"It has nothing to do with it. It is a conception simply concerned with granting belligerent rights which are of convenience to the donor as much as they are to the recipients. I will not go into the reasons, but for a variety of reasons in the present dispute we are not granting belligerent rights."

So that you have here recognition of an adoption of the principle supported by precedents as stated by the Foreign Secretary of that day.

Then there is a quotation from Mr. Churchill's speech during the course of the same discussion to which I wish to call your attention. That is on the 14th of April 1937, page 1068:

"When I hear my Right Hon. friend opposite speak of rebels, I must remind him that, sitting there as he does in the seat of the Whigs, he is departing from Whig principles. The sacred right of rebellion was one of their first doctrines. In regard to liberal statesmen, there the Right Hon. Gentleman sits, the successor to Mr. Gladstone, striving to uphold the great principles for which his party stands. But what was Mr. Gladstone's record? He was a strong supporter of rebels.

He was a strong supporter of the rebels in the war of American secession. There, we had a civil war in which the rebels were not only rebels but slave owners. Mr. Gladstone went about the country, and in a famous speech either at New Castle or Hull, proclaimed that the Confederate States (i.e., the Southern States) had not only founded an army, but that they had founded a navy, they had founded a Government, and more than that, they had founded a nation. (An Hon. Member: "He was a Tory then.") He was not a Tory then. Therefore, before one takes the view that rebels are like mad dogs to be put down and shot at sight we should remember these things."

In other words, in that debate the Government of the day in England recognised that while a rebellion may or may not be successful, while it has attained a stage of war, you must recognise and give immunity to those people who fight on either side, for what justification is there on the part of one set of them to fight and claim immunity as against the other side? If the I.N.A. shot, I dare say the British Indian Army equally shot from the other side. The justification is equal in both cases in so far as this particular struggle is concerned. Mr. Churchill goes on:

"If we search the history of the nineteenth century we shall find many cases where British Government have actually espoused the cause of rebels. The Hon. Member (Mr. Maxton), the leader of the Clyde-side party, with his customary candour and frankness, made no bones about supporting rebels. He declared that the question was whether or not they were rebelling for the thing you wanted."

I am quite certain that we have proved to the hilt that they were rebelling for a thing they wanted which is fully approved of by any civilised human being. There cannot be two different laws for two different sets of people.

"Every one will support rebels who are fighting for the things of which they approve and they will criticise the Government which is for the things which they

dislike. Therefore don't let us have too much of an attempt to make out that the Government in Spain have all the right on their side and the rebels none."

The Court will appreciate that I am pleading for a limited right. I am not here before this Court on the question of the recognition or non-recognition of the unfortunate failure of the Provisional Government to obtain the independence of India. That is not the issue. There is a very narrow issue. It is this. While they were fighting and struggling, were they or were they not entitled to the rights of belligerents.

> Mr. Churchill goes on: "Therefore do not let us have too much of an attempt to make out that the Government in Spain have all the right on their side and the rebels none. It is one of the most evenly balanced struggles and one of the most unpleasant and certainly it is the least cause for us to espouse. If we were to take the course which is recommended by the Right Honourable gentleman to break the blockade, if we throw the might of the British Navy into the scale, could he guarantee or could he be sure that we might not provoke that very alignment and crystallisation in Europe along those unnatural and idiotic—perhaps I had better say ideological—lines which it is our whole message and mission to rupture, or least to avoid."

So that Sir, even up to the very last war, up to the year 1937,, just on the eve of last war, it is perfectly obvious that a distinction has been maintained a distinction which I cannot too often insist upon between a state of belligerency which may be recognised and the rights accorded without the ultimate success of those who fought for the cause for which they could fight. They may fail but none the less In the interval they are entitled to the rights of belligerency.

Then, Sirs, there is a further point and I tell the Court that it is a question of fact. This Court should find that this Provisional Government had ceded to it the territories

which I have described. But while insisting on that finding of fact, because we submit that it was a fact, I wish to point out to you that from the point of view of belligerency it is quite unnecessary that the particular Government for the time being need have any territory in its possession at all, and for that purpose, I wish to give you illustrations in history. Take Belgium in the last war and all the emigre Governments residing in London during the last but one war and the last war. What were those emigre Governments? Not an inch of territory which they could call their own at that time and yet who ventures to say before this Court 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 its own country and not have the right to claim, even if they failed, all the rights and immunities as far as their soldiers are concerned of belligerency. I think, Sirs, the last war has illustrated more than any other that some of these old principles may be overdone and that it is quite unnecessary in order that you may have a state of war, that country that is fighting a war on one side need not necessarily at that time have, what I may call in the common English parlance, a local habitation though it may have a name. Many of these emigre Governments were deprived of their territory and the fact that they were deprived of their territory temporarily, or the fact that the Indians were deprived of their territories for 150 years, makes not the slightest difference to the point that we are submitting to the Court. What we submit to the Court is this. They were all liberating armies, trying to liberate their country and therefore were entitled to the immunities of those who were fighting. The next question before you, Sirs, is this. There is no such thing as the law of limitations in dealing with nations so that if either the Dutch or the French or anybody else was trying to fight for the liberation of their country while having lost their territory to the enemy, can it ever be argued in a British Court that those who were fighting to liberate their country were not fighting a struggle where, they were entitled to

the rights of belligerents? Supposing any of them failed, is it to be said in a British Court that they were not fighting a struggle to which all the laws or immunities and privileges of a fighting army exist? I therefore urge upon you not to take the instance that you have before you as any different because we happen to be Indians. Remember that. They were trying to liberate their country. I am not here to espouse the cause of the Provisional Government. I am pleading for men who fought under the orders of their Government for the liberation of their own country. If therefore they were entitled to fight for their own country for the purpose of liberating their country, I am entitled to tell this Court that they are entitled to the privileges of belligerency. One more instance on which there was a certain amount of struggle in proving the facts is the case of the Maquis in France. Remember the facts. At the time when the Maquis were fighting, the 'de facto' and the 'de jure' Government in France was Marshal Petain's Government and the latter were allied with Germany. The Maquis were fighting in order to release France from their own French Government which was allied with Germany, and what did Eisenhower say? I am going to read that to you because it is a very short document and it is very important. At that time it was apprehended that the Maquis might be dealt with unjustly by the then French Government, because it was the 'de jure' Government of the time and would shoot as rebels, very much the same as the Advocate General will later on argue to say about the persons who took part in the Indian National Army. But you have the pronouncement of no less a person as Field Marshal Eisenhower that that shall not be. In other words, if persons with a view to liberate their Government, fight against their own Government, they are entitled to the rights of belligerents. That was the reason why I was very anxious that I should be able to prove that statement. Sirs, this is the statement which has been proved and I may incidentally agree to what my learned friend insisted upon that I should put in also the German

view of the matter. If he prefers that it is his look out. I do not. I prefer the American and the British view.

"There is conclusive evidence that the German forces in France are—

(I am obliged to my honourable friend for saying that he does not doubt the authenticity of the source, meaning that it came from General Eisenhower. Of course he insisted that I should put in the second passage and I leave you to judge which of the two you should prefer, with the submission that you should prefer Eisenhower to General Keitel.)

"now recruiting members of the French resistance group as France Tireurs and today an announcement issued from SHAEF in the name of General Eisenhower makes these four points:

1. That the French forces of the interior constitute a combatant force commanded by General Koenigsgaud forming an integral part of the Allied Expeditionary Forces.

2. That the French Forces of the interior in the Maquis bear arms openly against the enemy and are instructed to observe the rules of war. They are provided with a distinctive emblem and regarded by General Eisenhower as an Army under his Command.

3. Reprisals against resistance groups violate the rules of war by which Germany is bound."

This is what I ask you to do: that anything done against the members of the Indian National Army fighting for their freedom according to the rules of war,—I submit that any action taken against them is a breach of international law.

4. "Every effort will be made to trace the authors of any atrocities against members of the forces under

General Eisenhower's Command. Steps to this end are already being taken."

Then the rest reads:

"General Eisenhower in a declaration broadcast to the B.B.C. tried to legalise the French partisans as a fighting force...."

The question that arose was somewhat delicate from a constitutional point of view, because for the time being the then French Government was still under the thumb of Germany. The people of France for the time being fighting against their Government which was pro-Germany were undoubtedly guilty of fighting against their own Government, but the ground of immunity accorded was that they were fighting alongside the allies for the purpose of freeing France. What is the distinction, I ask, between those who fought on the side of, even if we say Japan, for the purpose of freeing their own country? With very great respect it is difficult to understand any distinction. In other words, if the Maquis were entitled to all the privileges and immunities of a good fighting force for liberating their own country, I cannot see how you can fail to accord a similar treatment to those standing in the position of the Indian National Army.

Then, I read on:—

"General Eisenhower in a declaration broadcast by the B.B.C. tried to legalise the French partisans as a fighting force. From responsible circles in the Wilhelmstrasse the following statement has been given out:

"This attempt by the Allied High Command is unjustified. French partisans revolt against the legal French Government and violate the French laws, which enforce capital punishment for such violations."

Now you are asked solemnly to adopt what the Germans said in a similar situation. With what face could ever such an argument be presented to a British Court!

"The activities of the French partisans do not constitute regular war conduct...."

(Precisely the kind of argument that is likely to be advanced.)

"The activities of the partisans do not constitute a regular war conduct but a malicious system of ambush fighting against the occupation power. Thus the partisans have forfeited the right to be treated as regular troops."

I submit that the view put forward by General Eisenhower is the more correct of the two. But the other view clearly shows what I have to establish before you in order to claim immunity, namely that it is a regular, organised army, fighting according to the laws of war, and not guilty of any personal atrocity beyond and outside merely fighting a regular war, and it is fortunate in this case, the first test of its kind, because the issue is neat. There is not even a charge of any personal atrocity. My submission to the Court is that the British, and I mean no empty compliment, civilised instinct has recognised that if a struggle for freedom is waged, then if it reaches a stage at which there is an organised Government and an organised army, it must be accorded all the rights, privileges and immunities of a fighting army, and that is what I plead for.

The question which arises under Section 79 of the Indian Penal Code is that by all rules of civilised warfare what you claim for yourself you must accord to your opponents, even though you may have succeeded in defeating them. You are entitled to come to your own conclusion on the merit of the controversy at issue before you. But the Government says this:—

"The policy of the Government of India is, however, that only these cases will be brought to trial where there are serious charges, apart from that of waging war against the king."

As I said, it is not law and in no manner binds you. I must fankly confess that much, because it must not be said that I was trying to take refuge behind any executive statements. But the fact remains that behind that statement is almost a reluctant admission that waging war is in this case not an offence, or at least seriously treated as an offence. That is perfectly obvious, not because waging war per se is not an offence, but because in the circumstances of the case, where, with an organised government and an organised army, a war was carried on, then waging that kind of war is not an offence. I am not denying that if ten individuals in India collected arms and began to fight the Government of India, waging war is not or would not be an offence. But what is meant is that waging war, meaning the prosecution of war in the circumstances of the case, namely, of the Indian National Army under the Provisional Government,—that is not an offence. But it is a matter which I want to be judged entirely on the merits of the legal and factual submissions which I have made.

The next issue which really, I submit, does not arise, but in as much as I have only one address before this court I must try and anticipate things and answer them, —sometimes it is unjust to one's self, because one may raise more things than the opponent is likely to think of and I may make a present of an argument to him—but having regard to the rules of this court, I am obliged to resort to that course—it cannot be helped; otherwise I should have preferred to have a short reply to any new point which may be raised by my learned friend on the other side. The short way to deal with the issue is this: the cases which I have cited and the authoritative works which I have quoted to the Court, clearly show that in judging this case, no question of allegiance arises. All insurgents, while they are fighting, are still held by allegiance, and all the books which I have read will be worth nothing if the question of allegiance had been raised,— because until you successfully throw it off, the prima facie allegiance, if I may so call it, exists; and none the less

while it is not successfully thrown off, while it is in that ambulatory stage, the rights of fighting and the rights of war, if it is a properly declared war and a properly conducted war (I will not repeat that qualification again, you will assume it from me that when I talk of the rights, of war I am talking of a properly declared war and a properly prosecuted war as to which I have made my submission)—in such a case ex hypothesi the allegiance exists. The rebels want to throw off the foreign yoke, and the result is that undoubtedly if the question of allegiance arose or had ever arisen, no grant of immunity to insurgents fighting for liberty against the parent State would have ever arisen; but the fact remains that notwithstanding the fact of allegiance remaining, the right and freedom to liberate their own country being recognised at the time, it is given effect to by recognising belligerency; that is to say, when an organised force is fighting under an organised government for its own freedom, while they have not completely succeeded and token allegiance remains, they are still entitled to fight. That is recognised by the law of nations. But should such a question ever be raised by my learned friend—which I submit is irrelevant—I have important submissions to make. First, that on the events which took place at Farrer Park on 17th February, there was no allegiance left and hence it is very important that I try to concentrate my attention on what occurred at that meeting.

The fact which probably may remain unnoticed, but which was most important, was that the British officers and British other ranks were separated from Indian officers and Indian ranks. It is an extremely important fact to remember, in order to be able to appreciate the events and the occurrences of that day. They having been separated, the Indian officers and ranks, numbering anything between 30,000 to 45,000, were all asked to assemble at Farrer Park.—Colonel Hunt made a short statement or speech, saying that he was handing them over on behalf of the British Government to the representative of the Japanese Government, Colonel Fujiwara. Colonel Fujiwara

then made a speech in Japanese which, as the evidence now shows, was translated both in English and in Hindustani; and the statement of Col. Fujiwara amounted to this—using my own language—that those of the Indian prisoners of war who wanted to join an army for the purpose of liberation of their own country were free to do so, and handed them over to Captain Mohan Singh. Captain Mohan Singh then addressed them saying that he was prepared to organise the Indian National Army for the purpose of fighting for the liberation of India: and we had the evidence—uncontradicted—that he was acclaimed by the whole of the Indian prisoners of war present. I wish even at the risk of repetition to submit that when an insurgent fights against the then constituted government to free his own people and his own country from the alien, the question of allegiance does not arise. I want in that connection to take the statement of Captain Arshad—it is a most emphatic statement he made.

"We believed that the only allegiance we owe is allegiance to our country." I cannot describe better than in his words the result of that day's proceedings.

That brings me up to a somewhat difficult subject like the case of any subject people, in particular India. All of you are aware that every charge of treason in England is a charge of working against the King and the country. The last one is the reported case of John Amery. In the situation in which an Indian finds himself, the question is under what circumstances and to what extent this question of allegiance can be raised at all, because once you divide the King from the country, it becomes a very difficult issue altogether for any human being to decide, and hence I would prefer to rest my argument on the occurrences of 17th February. The position of an Indian in a case of this kind is difficult and I am going to submit to the Court on first principles what its true solution is. Where the King and the country coincide there is no question of an alternative. If you fight aganst the King and also fight against the interest of your own country,

the question does not arise, but the question does arise where there is a fight for freedom, and I propose to read passages to show to what extent the world has progressed in the matter of the recognition of human rights. When you are nominally fighting against the King but really fighting to liberate the country, then the point is whether the question of allegiance can arise at all. Unless you sell your own soul, how can you ever say that when you are fighting to liberate your own country, there is some other allegiance which prevents you from so doing? That means that if that happens there is nothing but permanent slavery.

Therefore it is that I submit that in the circumstances of this case a choice was presented by the force of circumstances to those prisoners of war who were surrendered by Britain—I do not say wrongly—because there are reverses in the fortunes of war. Who am I to say whether it is rightly or wrongly done? At the same time you cannot disregard this most important fact that for the time being by reason of the exigencies of the war Britain found itself unable to give any protection to her soldiers to fight for the country and that being so, they found themselves in a very unenviable position. My learned friend may say: 'you ought to have remained prisoners of war,' and he may argue that they may do anything under the circumstances short of making war. I concede that proposition where allegiance to the King and country coincide, but where the two do not coincide, a different situation arises altogether. My learned friend may say that they were fighting on behalf of a puppet Government or they allowed themselves to be used as stooges of the Japanese. Even accepting this somewhat unenviable expression of stooges or otherwise, the question is one of fact, namely, whether or not it was a regular army honestly believing that it is fighting for the freedom of its country. The question of a bad name that may be given has really no relevancy to the legal issue but in as much as a great deal of dirt has been thrown by expressions of this character—puppet Government and puppet army and words to that effect—

and the question of the strength of that army may be raised, it is my duty to tell the Court how the evidence stands on record. The evidence that stands on record is that the No. 1 I.N.A. was formed and was dissolved in December. I shall forget that for the purposes of this case, because waging war which is the subject of the argument, applies to what you might call I.N.A. No. 2 I have attempted to prove and I have established that the I.N.A. though small in numbers, was fighting as allies of the Japanese Army and there is no ignominy in admitting that or in doing that, because the objective at that time of both the armies was undoubtedly to free India from Britain. The objective was no more and no less than that of the allies in fighting to free France or Belgium or any other country, and if in that process there was a unified command or a single strategy, you, Sirs, will not say with your knowledge of military affairs that that makes one army the stooge of the other. It is a phrase with which my learned friend will not be able to walk away if he uses it, and that is why I want to tie his legs, if I can. If the British and the American Armies fought under the command of General Eisenhower, Britain may not be called the stooge of the Americans, and I hope my learned friend will not descend to the level of calling the I.N.A. stooges of the Japanese. The evidence given by Lt. Nag is very important from this point of view. He was extremely prolific in the results and he came to prove at the instance of the Prosecution that there was a very organised regular army, and that a big war was fought. My submission is that he was hoisted with his own petard. If he proved that a regular war was fought, that is precisely my defence. He was qualified to speak about it. He was legal adviser of the I.N.A. and he told this Court in effect—I am quoting his words—that the two armies fought as Allies. Whether the alliance was right or wrong is not before this Court. The only thing that is before this Court is whether or not this army fought as an organised army. My learned friend will not be able to support any allegation that they fought for any other objective except the libera-

tion of India. If an allegation of that kind is made, it is a false allegation and we have given a complete lie to it. The prosecution witnesses from beginning to end admitted that the object of the I.N.A. was to fight for the liberation of India, and every one, whether volunteer or non-volunteer, willing or unwilling, has admitted that they had no other objective except the liberation of their own country. That being so, my submission to the Court is that in so far as any allegation is made to the contrary it is only put forward as a point of prejudice, and I had to meet it with a view to remove the prejudice, because as I said it is not in human hands to choose your allies under the circumstances which may be forced upon you. And whether you fight with the aid of X, Y or Z for the purpose of liberation of your own country, the fact that Y was otherwise a bad person has got nothing to do with the case. But in all human discussions there is always an argument at a tangent; many human minds confuse the issue, and hence it is that I have attempted to cross-examine, at all events in the briefest possible way to make this point clear. The point that I tried to bring out was that the I.N.A. was, though small, a very organised army, inspired by the best of motives, and fought for that purpose, though unsuccessful for the time being.

There is one other thing which I ought to have mentioned and I regret I omitted it while I was talking on the first issue. That was with reference to the Minister sent by Japan to the Government of Azad Hind. I ought to have stated earlier, because the points which I have mentioned were proclamation, recognition, declaration of war, followed by possession of territory, and also the Minister of the Nippon Government accredited to this Government. The last is not essential, but still in point of fact it was alleged, and I will state how the facts stand under that head. The fact is that a Minister was sent in fact. No less a person than Mr. Sawada of the Foreign Office told the Court that it was decided to send a Minister to the Provisional Government of Azad Hind, while he was the Vice-Foreign Minister and he was competent to speak

about their decision, that a Minister in fact was sent. As it happened he came without letters of credit or his credentials, and as if it mattered the whole argument was to show that a Minister ceases to exist because he did not bring the papers. Supposing one of you, Sirs, sent me your agent, and I choose not to demand from him his letter of authority and I accept him, it is a most extraordinary argument that the agent ceases to exist. That is a sort of logic which my learned friend wishes to apply to this case. But a good reason was given founded on diplomatic practice which you should accept. The evidence says that being a Provisional Government, in accordance with the dignity of nations, or comity of nations, or credentials are required. In other words, the important point is whether the man came and was recognised by the person for whom he was intended. During the evidence, my learned friend got an answer from one of the witnesses to the effect that the head of the State, Netaji Subhas Chandra Bose, did not receive him. But there is further evidence which really destroys any other point on this question: Thereafter credentials were asked for, the head of the State according to his conception required it, and you have the evidence that credentials were prepared and that they were signed by the Japanese Emperor and were despatched but under the then conditions of war they did not reach. But because the Japanese Minister was duly accredited I submit it is a reinforcing argument in my favour. When he came, the two Governments—meaning the Provisional Government of Azad Hind and the Japanese Government—took a different view of what you may call diplomatic practice, but that does not affect the issue. The sending Government in the end, when so required, actually sent letters of credit, and the fact that it reached or did not reach does not affect the issue; at all events it completely cured such defect or deficiency as there was in the procedure. And in point of fact I ask the Court to hold that there was a duly appointed Minister, which is all that arises here. The reason why we brought in the evidence was among other things that the Provisional Government of Azad Hind was

a properly organised Government, and accepted, and the acceptance does not require necessarily the sending of an envoy, or an ambassador, or a Minister, or whatever the position or the relation between the Governments may be.

What is it that the I.N.A. embarked upon in collaboration with the Japanese? According to their agreement which I submit I have proved, any part of Indian territory which may be liberated would be immediately handed over to the I.N.A. If you, as men of affairs, understand things rightly, it is the only thing to do. Where is the question of being an instrument? If, however, there was any instrument, it was the Japanese, because it is they who were assisting in liberating India, with a view that the liberated parts of India would be handed back to the I.N.A. The facts of the case are, that the two proclamations were issued by the representatives of both the Governments—Gen. Kawabe on behalf of the Japanese Government and Mr. Subhas Chandra Bose on behalf of his Government. You may say nobody fights a philanthrophic war. But whether or not it was philanthrophic remains to be seen. I can well understand, and I submit it for your consideration, that Japan as indeed one of the witnesses said, that the East would be better protected by a free India or that they might have better prospects of trade which is their only means of maintaining their standard of life, which incidentally is also the means of Britain. It was not a philanthropic war at all. So far as the freedom of India was concerned, it was, I submit, the object of that war, and you have it in evidence on oath before the Court. It may well be, I presume it was, that a free India might better be able to assist by means of trade and otherwise to enable the Japanese to maintain their high standard of life. Therefore it is idle, unless people appreciate the true issue for them, to say that unless you conquered territory there can be no other object in assisting in getting its freedom. It is that idle argument which I wish to meet before this Court. But we are not left to speculation. My learned friend cross-examined one of the witnesses. He said, Oh, yes, you are assisting the Indian National Army with a

view to attain your Japanese war aims, and he thought he had got away with it. But when we asked what were the war aims, then I am afraid all this cross-examination fell to the ground. He said it was with a view to assist the war aims which was to free India. There may be many who doubt promises in this country but I am not one of them. I am one who looks on the brighter side of life and believe that if India could be freed in that way, why honest men should not believe it, it is difficult to understand. The question before the Court shortly is this. What were the relations between the I.N.A. and the Japanese Army. That is the short point. It is a point of prejudice and yet it is my duty in defence of the honour of those whom I am defending and the group to which they belong that they were not the stooges of the Japanese, as cheaply might be said by the opponents. That is the short history of the position of the I.N.A. vis-a-vis the Japanese Army.

I was speaking about the quality of allegiance, and I submitted to the Court that in a case of this kind where you have got to administer the law as a matter of justice, equality and good conscience, you may have a case where the country and the King do not coincide and where there is an imposed allegiance on a subject people; and I am not talking merely as a matter of theory. I am going to give you an instance of a case of this kind which has occurred in the days when the British Commonwealth was called the British Empire; and the statement that I wish to read is the Declaration of Independence by the United States of America on the Declaration of war and before they had attained any statehood, as it is called in the cases which I have given. I am reading from a book called "Speeches and Documents on Colonial Policy", edited by Keith and published by the Oxford University Press in London. It is at page 70. It says:

> "When in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume, among the powers of the earth the separate and equal station to which the laws of nature and of na-

ture's God entitled them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness"— (and here I would like to point out that the recent pronouncement of Mr. Truman and of Mr. Churchill are to the same effect)—

"that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence. indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the form to which they are accustomed. But, when a long train of abuses and usurpations, pursuing invariably the same object, evinces a sign to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government and to provide new guards for their future security. Such has been the patient sufferrance of these colonies, and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having, in direct object, the establishment of an absolute tyranny over these estates. To prove this; let facts be submitted to a candid world:"—

(Then they cite the grievances—I will not read them all). Then the statement says:

"Nor have we been wanting in attention to our British brethren. We have warned them, from time to time, of attempts made by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of the mankind, enemies in war,—in peace, friends. We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the World for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare"—(and this is the point)—"That these United Colonies are, and of right ought to be, Free and Independent States;"—(and then comes the important sentence)—"That they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved; and that, as Free and Independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which Independent States may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other, our lives, our fortunes, and our sacred honour."

Here you have a case in which this quality of allegiance came to a test. They owed allegiance in the fami-

liar sense to the King of England. They owed allegiance to their own country, and they realised that the time had arrived when the question became one of conflict between the allegiance to the King and the allegiance to the country. So that in accepted history, we have got a classical instance of a case where the choice between allegiance to the King and the allegiance to the country was presented to the world, and men of honour chose allegiance to their own country to the imposed allegiance to a foreign king. Therefore I venture to stand before this Court today with the most classical illustration, the illustration of a race, of a country, that has saved the world today, and in the last war and did marvels in the cause of civilisation; and if that illustration is not going to be respected, I submit justice would be denied completely. I submit that what happened at Farrek Park, by reason of the actual state of events in this country, was perfectly legitimate, and indeed legitimised by what I may call the course of history. Indeed it is amazing how from the year 1776 to today the words are as true as they were then:—

> "We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."

And I commend this to you, Sirs, in order that you in your wisdom will consider it just, if ever any question arises. This declaration took place on the 4th July, 1776; and ultimately a war was fought, which resulted in 1781 in establishing what is today the United States of America as an independent republic of the world. I venture to submit this a historical instance, important in its character, valuable as showing the way in which the world has functioned. I want to call attention to the oath of allegiance to the Provisional Government of Azad Hind and its context, for it is important that you should know it.

> "Indians in East Asia today are no more the subjects of an alien power; they are the proud citizens of the

Provisional Government of Azad Hind. To bring this home to the mind of every Indian in Malaya and to rouse our community to a full realisation of the responsibilities of the new status, it has been decided to ask each member of the Indian Independence League to take an oath of allegiance to the Provisional Government of Azad Hind. Detailed directions regarding this have already been sent to all the State branches along with the form of the oath. Each member, on taking the oath, will be given 'oath of allegiance card' and the 'Indian Independence League membership card' he or she now holds will be taken back by the officer administering the oath and destroyed. The privilege of owing allegiance to our government will be extended only to members of the Indian Independence League as any Indian who is not a member of the League cannot be considered as a true Indian. As Netaji said in his speech in Syonan on 25th October 'we will not treat them as Indians or friends. There is no place for them in India'."

What I wish to point out is that in so far as these documents are concerned they evince the same interest as was evinced by those who issued the Proclamation of Independence of the United States of America.

The next point to which I wish to call attention in this context is the law of treason with reference to India. So far as India is concerned, it is a loose expression. The whole of the law on this subject has been codified in the Indian Penal Code and I call attention to Chapter VI of the Indian Penal Code—Offences against the State. There you find codified what is the law of treason in other countries. Section 121 is waging or attempting to wage war against the Queen, 121A is conspiracy to commit offences punishable by 121, 122 is collecting arms; 123 is concealing with intent to facilitate design to wage war; 124 is assaulting Governor-General etc., 124A is sedition; 125 is waging war against any Asiatic power in alliance with the Queen;

126 is committing depredation on territories of a power at peace with the Queen; and 127 is receiving property taken by war or depredation mentioned in Sections 125 and 126; 128 is public servant voluntarily allowing prisoner of State or war to escape; 129 refers to a public servant negligently suffering such prisoner to escape. These are the offences against the State.

My submission to the Court is this. In so far as the question of the law of treason is concerned in this country, my learned friend cannot talk of treason. For what would be called treason in the common law of England, my learned friend would have to look to the language of Chapter VI of the Indian Penal Code. In other words my submission to the court is this—that generally speaking, apart from Section 121, my learned friend will not and has no right to resort to what he calls the principles of treason.

The next point to which I shall call attention is a classic book on the Law of Engand written in old English. I have got a transcript of it here. It is on page 95:—

> "When a nation has placed itself under the protection of another that is more powerful, or has even entered into subjection to it with a view to receiving its protection,—if the latter does not effectually protect the other in case of need, it is manifest that, by failing in its engagements, it loses all the rights it had acquired by the convention, and that the other being disengaged from the obligation it had contracted, reenters into the possession of all its rights, and recovers its independence or its liberty. It is to be observed that this takes place even in cases where the protector does not fail in his engagements through a want of good faith but merely through inability. For the weaker nation having submitted only for the sake of obtaining protection—if the other proves unable to fulfil that essential condition, the compact is dissolved—the weaker resumes its right, and may, if it thinks

proper, have recourse to a more effectual protection. Thus the Dukes of Austria, who had acquired a right of protection and in some sort a sovereignty over the City of Lucerne, being unwilling or unable to protect it effectually, that city concluded an alliance with the three first cantons; and the Dukes having carried their Complaint to the Emperor, the inhabitants of Lucerne replied "that they had used the natural right common to all men, by which everyone is permitted to endeavour to procure his own safety when he is abandoned by those who are obliged to grant him assistance."

This is the law which has been enunciated and accepted in England ever since. This was in 1797.

My submission is that the insurgents are in the position of rebels up to a stage, but a stage is reached where if the State has an organised army it becomes possessed of the right of belligerency, even though they may ultimately fail. The question of allegiance does not arise then, but I would not be surprised if with a view to divert the discussion into a wrong channel any such statement is made.

Before I go further, I wish to make quite clear a point about the prisoners of war. The prisoners of war may submit even to the extent of assisting the enemy—that is passive assistance up to the point of labour. You will find in the same books that they may not actually join the enemy and in this connection I wish to submit to the Court what was the relation of the I.N.A. to the Japanese. You belong to the profession of arms and will appreciate what I am submitting to you. I have stated the position as much against myself as possible. I am now assuming that the events which took place at Farrer Park did not take place. I am assuming against myself that they were just prisoners of war. The question still remains what is it that they did. The question arises whether they ever allowed themselves to be used as what I might call tools of the enemy or any other instruments, whatever the phrase

used. Having been surrendered as prisoners of war, if the Japanese chose to leave the Indians to secure their liberty —(I am willing to agree that it suited them) that by itself does not bring the I.N.A. and the accused before us within the prohibition imposed upon the prisoners of war. It is a point that I wish to elaborate up to a stage. I wish to state that there is no obligation whatever which prevents a person who is a prisoner of war from fighting on his own for the liberty of his own country. I submit that my learned friend will not be able to controvert that, and therefore I wish to make it quite plain that the question of the relation between the Japanese Army and the I.N.A. the question of the objective of the Japanese as regards India—these points have got to be re-emphasized before this Court. Unless they are borne in mind, the Court may easily go into a wrong track.

The point is this. I quite agree that the Court or any member of it may say: "They were fools in believing the Japanese". That has nothing to do with the case. Other men may have been wiser. The question is whether those who formed the I.N.A. did believe in a bona fide manner that they would be able to secure the freedom of the country. If they bona fide believed it, the fact that there are wiser men on earth does not alter the issue so far as the renouncement of the guilt of that army fighting for the liberation of India is concerned. Hence it is that I wish to submit that the evidence which I submitted yesterday and a few more passages to which I wish to call attention today is relevant for that purpose. You have it in evidence and it is a matter again in which the question is of one's own belief. The question is not whether that belief was something which probably the Court or any member of it may think was of very credulous people. That has nothing to do with the point. You have it definitely in evidence before this Court, in the evidence of prosecution witnesses, that if any nation or any race or any class came into being to oppose the independence of India, they were prepared to fight that, including the

Japanese. That is why I was very anxious to point out that it is only when a story is completely pieced up and comes before the Court that its significance can be appreciated. The whole point of it is that the question is not so much as to whether you or I or anybody else would have relied upon it as a promise. From that point of view probably we are a credulous race. We have relied on many promises of others and of Japanese also. But that has nothing to do with the point. The point is that if these people honestly believed, as I say they did, that they were securing the independence of India, then the question of what a prisoner of war cannot do, does not actually arise and will not arise.

In this connection I would like to read the evidence of Nag. The question that I put to him was: Do you remember ever attending a meeting in Singapore at which Capt. Mohan Singh told the prisoners of war that if need be they would fight the Japanese in addition to the British? He said he would fight anybody who stood in his way even if it were the Japanese or anybody else. The next is P.W.9 Havildar Sucha Singh, and this is the passage to which I wish to refer. "He said that the I.N.A. has already been started in Singapore and a good many people had joined it; and the I.N.A. will only fight for the freedom of India and for no other cause. If we go to India and the Japanese go with us, we are equipped with arms, and we will fight the Japanese if they turn round against us. This is a golden chance for us and we may not get such a chance again." The next witness is P.W. 18. He said: "After I was posted to Bose Brigade, Captain Shah Nawaz Khan delivered a lecture which I heard. He said that the Bose Brigade which was formed was to go first of all to the front, and this Brigade is composed of picked officers and men." And then the passage goes on: "He also said that if and when we fight with our allies the Japanese nation, it should not happen that we remain as second rate in the fight and thus disgrace our nation. When we reach India we shall meet Indian men and women, and those

who are elders to us we should consider them as mothers and those who are younger we should consider them as our daughters and sisters, and if anybody will not obey these instructions he will be shot dead; and if and when India is freed and the Japanese who are now helping us tried to subdue us, we shall even fight them. He also said that even now if a Japanese gives you one slap, you should give him three in return, because our Government is parallel to their Japanese Government, and we are in no way subservient to them, and that when we reach India, if we notice any Japanese maltreating an Indian lady, he should be first warned by word of mouth not to do so, but if he continued to do so, we were at liberty to use force and even shoot him in order to prevent it, because the fight which we are making now is for the freedom and well-being of India and not for the benefit of the Japanese. This lecture was delivered in Taiping," Then, I come to P. W. 19. He said: "I was aware of the declaration of the Provisional Government of Free India. Prior to my joining the I.N.A. I was in a prisoner-of-war camp." Then I come to the other passage which is relevant for the purpose. "I knew after joining the army that the sole ambition of the I.N.A. was to fight for the freedom of India against any army in the world, but my own idea was not to fight but to escape. By 'any army in the world' is meant also the Japanese." Then I come to P. W. 24. He said: "In August 1943 I was in Neesoon camp. Captain Shah Nawaz came to address the Heavy Gun Battalion there. He said that the I.N.A. had been formed for the liberation of India and it would fight not only British Imperialism but also those who would put obstacles in the way of India's freedom or any other party which wished to subjugate India."

I had hitherto avoided reading any evidence because there was no substantial contest as to the facts which have been proved. The record of evidence clearly shows that in so far as the I.N.A. was concerned, they acted on their own. No doubt, they accepted the alliance with

Japan on promises which they, at all events, honestly and sincerely believed, and if they believed them, I submit there can be no question of any obligation. There are so many matters which have been gone into and which in patience we suffered in the belief that there was no relevancy to the charges before the Court. But now that they are before the Court, I must separate them as best as I can and, while separating them, give answer to every single suggestion that was made or is likely to be made. Hence it is that I am here before the Court to point out that in doing what the I.N.A. did, there was no question of any breach of any obligation or the prisoner of war obligations or duties, remembering the extreme obligation, which, I submit, I have stated as strongly against myself as it is possible to do.

The next point to which I wish to call attention is this. In addition, there is the evidence of the last witness, D.W. 12, and that sets out more or less fully the point of view of those who honestly believed in doing what they did. I am not saying that the Court is not called upon to examine the matter in its own light. At the same time, the Court has got to see not so much what any individual member might have done as that whether you believe what they said before this Court and that was their object.

This witness said: "My reasons for joining the I.N.A. were many. I admit that it was a difficult question to decide whether I should join the I.N.A. or not, because there were many factors which I had to consider. It was a momentous decision. Uptil that time I was not greatly interested in politics or the political welfare of India because I was educated that way, and moreover when I joined the Indian Army in 1936 I felt that politics was not encouraged in the Indian Army and hence I stayed away, but when the question of I.N.A. arose and we had to decide whether we should join it or not, I had to think deep, but it was such a big question that I could not make a decision myself."

The reason why I am reading to the Court is this. He was a witness of truth and the very fact that they had a conflict in their minds is illustrative of the extreme bona fides of the men who chose to take the course which they did. Hence it is that I shall read a few more lines of that evidence: "I remember sometime in the beginning of July 1942, when we were being asked whether we were going to volunteer for the I.N.A. or not, I was staying at Mount Pleasant, Singapore, where Capt. Mohan Singh had his headquarters. I know Capt. Sehgal for the last 12 or 13 years; we were in College together and we were friends there. I felt that if I had a discussion with him along with a few other officers, we may come to some decision regarding volunteering for the I.N.A. So in the beginning of July, he and two or three other officers came to my bungalow at Mount Pleasant and we went through this question of joining the I.N.A. We discussed all the pros and cons. We unanimously decided that under the circumstances we all owed our allegiance to our country.

"We also felt and agreed upon that so far concerning our career in the Indian Army, there had been distinctions between the British officers and the Indian commissioned officers. The Indian commissioned officers had not been treated as well as our English comrades or brother officers. We also felt that if the senior officers present in Singapore or in Malaya did not join the I.N.A., it was quite possible that the Japanese would exploit the Indian prisoners of war, because then the Indian prisoners of war would be split up into small groups. Some people would join and some would not, and the Japanese would take advantage of that and enrol people from amongst the prisoners of war who would be willing to do any service for them. We felt that that would be a disgrace to Indians. We agreed that if the senior officers joined the I.N.A. and formed a strong party and organised the I.N.A. as a regular army and fought the Japanese on every point regarding the army, we would have a far stronger position with the Japanese than otherwise. We also felt that

if we created an army of our own, we may be able to establish a certain amount of standing with the Japanese, and by doing that we may be able to stop the Japanese from committing any atrocities on the Indians in Malaya. We had seen what the Japanese were doing to the Chinese and Anglo-Indians and the Malayans. They were not treating them very well. Certain atrocities had been committed on the Chinese and also on the Eurasian community, and we thought that if the Indians refused to join the I.N.A. it was quite possible that the whole of the Indian community in Singapore or in Malaya might suffer. So we had a discussion on all these points. But then arose the question that if we did join the Indian National Army, what would be the reaction of our people in India?"

My suggestion to the Court is this that, apart from the process, the thought which the last witness brought to bear upon it and the discussions which he had with other people, clearly show that they did not take the steps either dishonestly or hastily. They took this step after taking into account the whole of the situation in existence at that time, and the future as they saw it.

And if that is the condition in which they did it, I ask the Court to hold that they honestly believed in the propriety of the step they took and the justice of the cause for which they took it. And hence it is that I wish to point out to the court that it was not a case, as the text-books say, of a prisoner of war joining the enemy in order to fight his battle. That, I quite agree, according to the text-books he may not do. But where a prisoner of war already released, as I have told you earlier, finds himself in the situation in which he did and then fights for himself and for his own country, being prepared to fight against the Japanese themselves if they ever became untrue to them, in such circumstances, I submit, there was no question and there could be no question of the Indian National Army being guilty and of those who joined that army being guilty of any act which may be regarded as

contrary even to what you may call the code of duties imposed upon a prisoner of war. I have already submitted and at the risk of repetition I will say, that it is entirely irrelevant and there is no such thing as a charge against these men before you of a breach of duty as prisoners of war. In fact there is no such charge in the Indian Penal Code, so far as I can see. There may be a charge under the Indian Army Act but no such charge is at present before you. There is not even a charge of desertion and indeed there cannot be, for when the prisoners of war were surrendered there was no occasion for desertion. So let us not be carried away by what you may call the popular language of desertion, breach of duty and all the rest of it. Let us concentrate, and I ask the Court so to do, on the charge on which the accused are on trial before the Court, and on that only. The rest is a matter of prejudice; and if one has a complete answer even on a matter of prejudice, it is a matter of satisfaction. It is a matter which I understand—and I appreciate—that tribunals of this kind are likely to take account of, namely, that general bona fide, honesty and integrity all goes to the credit of individuals who are on trial as so much in their favour.

Then, Sirs, there is one piece of evidence in so far as this particular matter is concerned, a piece of evidence of extreme importance, and that is how the first I.N.A. broke up. As to how it broke up you have evidence before the Court and it is unanimous as to the reasons for which that event occurred. Rash Behari Bose was for many years in Japan and he was too easily inclined—to put it most mildly—to believe in the Japanese. Mohan Singh on the other hand was very cautious. Mohan Singh in fact has himself evinced by his conduct that should anything happen to him, that is to say, if he is arrested or removed, the army should be dissolved. And the real reason is this, that while on the one hand Mohan Singh was anxious that there should be an army formed for the liberation of India, at the same time he was equally anxious that the army should not serve as a mere instrument of Japan. And it

is because he had his suspicions, is because—of the Resolutions in the Bangkok Conference with regard to making clear the aims of the Japanese for the purpose of fighting the war so far as India was concerned,—that Mohan Singh began to lose faith in the promises of the Japanese. And as soon as the Japanese realised that through the agency of Rash Behari Bose—and you have picturesque evidence here—Rash Behari Bose came along, collected all the senior officers and declared that Mohan Singh had been removed. I could not quite appreciate, with all the thought that I devoted to it, the point that my learned friend made or attempted to make as to whether he was actually removed by Rash Behari Bose or by the Japanese. For my own part I do not mind the suggestion that my learned friend made that the Japanese arrested him. That is precisely the point, that the first I.N.A. was at a stage at which there was a trial of strength between those Indian Nationals who were members of the I.N.A. and the Japanese. Later on when the Japanese realised that the Indian National Army and those who were likely or wanting to join it were not prepared to become tools in their hands, that there was a break, and hence when you come to the second I.N.A., when Subhas Chandra Bose took command of the Indian National Army, the second time you find an association between the two armies,—may be very unwilling on the part of the Japanese. Very often one has to make a choice when one finds a strong man on the otherside; and hence it is that I wish to insist before this Court that throughout the dealings between the I.N.A. and the head of the Provisional Government of Free India at this time, the position taken up by them was not of an instrument of the Japanese, but a body formed with the object of liberating themselves, no doubt getting all the assistance that they could from the Japanese as an allied army. And that, I submit, is the key to the bona fide of the men, the belief of every individual man who at all events thinkingly—if I may use that expression—joined the I.N.A. I daresay it often happens in the world that

once you find a thinking and leading man taking a course, other people bona fide believe it to be the true course, and join it. Therefore I submit there is ample evidence on record, evidence emanating from witnesses which in ordinary courts and tribunals is the best to be relied upon by the defence, evidence from prosecution witnesses, not all willingly given, that they fought their own ground, they fought their own cause, and therefore there was no question whatsoever of their breaking any duties which they owed as prisoners of war. But you have to remember all the time and again and again that there is no such charge in the trial before you. There are only two charges before you which I need not repeat. But I want to be quite careful because it will be my duty to deal with the material, lest it might be suggested that I did not deal with it, and I wish to point out its relevancy and its significance to the extent to which these points bear on the conduct of the men on trial before you. I have no desire to shirk an inquiry; in fact I am here as far as I can—apart from any questions of private opinions on political issues—to impress upon you the truth, integrity and sincerity of men, which after all is a bigger asset sometimes than the legal technical issue. There is also the evidence of Lt.-Col. Loganadhan, D.W.7 with reference to the question; and I am obliged to refer to it particularly because of the pamphlet called "Our Struggle" which was placed before you. There is just one point which I must make before I read the evidence, that all that is proved is that the pamphlet was issued. But I hope and trust that my learned friend will not suggest that the mere fact that a pamphlet is issued, that by itself proves the truth of the statements made therein. Let me therefore begin by saying that I am not obliged to explain why Rash Behari Bose said what he did. It will be an error on the part of the Court to say that because Rash Behari Bose said something about Mohan Singh, therefore it is true. At the same time I wish to call attention to this evidence with a view to pointing out the terms on which Mohan Singh

and Rash Behari Bose stood, with a view to point out that any allegations emanating from the disappointed Rash Behari Bose at that time are not to be taken as words of truth. Secondly, in any case an allegation made by A against B, neither of whom has appeared in Court as a witness is proof of the allegation made by him.

With this observation I now call attention to the evidence of D.W. 7 (Lt.-Col. Loganadhan).

"I know Captain Mohan Singh. When I joined the Indian National Army he was G.O.C. The relations between Captain Mohan Singh and Rash Behari Bose were not very happy. Of my own personal knowledge I know that Rash Behari Bose, having lived so long with the Japanese, was inclined to be guided and controlled by them. Whereas Mohan Singh said he felt that the Japanese should be dealt with a firmer hand than what Rash Behari would be able to do."

I then come to D.W. 12 (Captain Arshad). The passage to which I call attention is this:—

"I was in the first Indian National Army Headquarters, then as General Staff Officer in G. Branch. The first I.N.A. was dissolved in December 1942. The I.N.A. had been raised after the Bangkok resolutions were forwarded for ratification to the Japanese Government. The Bangkok resolutions were the result of a Conference held in Bangkok in June. There were many resolutions in that and they were passed by the Conference and then sent to the Japanese Government for ratification, and we hoped that the ratification would come quickly; but as the days went by Captain Mohan Singh, who was then G.O.C. of the Indian National Army, felt that the Japanese were delaying the ratification of the Bangkok resolutions and he asked the Japanese liaison body which was attached to us, called the Iwakuru Kikan to expedite the ratification of the resolutions. They were not very clear in their replies. They tried to delay them as much as possible. I

was present. Captain Mohan Singh kept his headquarters informed of all the correspondence and the arguments which he was having with the Japanese. Captain Mohan Singh told us his doubts of the intentions of the Japanese. He said that he noticed that the Japanese were not playing the game, and he said that if the Japanese continued with that attitude of theirs he would dissolve the Indian National Army, and we all agreed with him because we felt that unless and until there was a clear understanding between the I.N.A. and the Japanese we would not continue the Indian National Army. Besides that, there was another main point of dissension between the Japanese and Captain Mohan Singh. At the Farrer Park meeting, the Japanese had handed over all the Indian prisoners of war to Captain Mohan Singh. Until that time the members of the I.N.A. as well as those prisoners of war who had not joined the I.N.A. were under the command of Captain Mohan Singh. But in December the Japanese wanted to take those people away from Captain Mohan Singh who had not joined the I.N.A. Captain Mohan Singh felt that the Japanese were not keeping to their word and he refused to part with the prisoners of war. These main reasons as well as the other minor reasons forced us to dissolve the I.N.A."

And, Sir, the Bangkok Resolution No. 13 which is referred to, reads thus:

"(13) Resolved that the Indian National Army shall be made use of only

(a) For operations against the British or other Foreign powers in India.

(b) For the purpose of securing and safeguarding Indian National Independence, and

(c) For such other purpose as may assist the achievement of the object, viz. Indian Independence."

Lt. Nag (P.W.1) refers to the same subject in these terms.

"Capt. Mohan Singh left written instructions that if he was arrested, the I.N.A. should be dissolved. 'In the event of my arrest the I.N.A. will be dissolved and all the I.N.A. badges of rank and records will be destroyed.' There was a general feeling from the beginning that the I.N.A. should not be subordinated to the Japanese and that we would not allow it to be subordinated to the Japanese. There was no question of dissolving it at any time during those days. The predominant motive was to free India for the sake of Indians.

"After the 2nd I.N.A. was formed the same feeling was there, until Subhas Chandra Bose arrived in July 1943. After that everybody thought that they had got a leader who could guide them on proper lines without being subordinated to the Japanese. Thereafter the two armies fought as Allies, i.e., the Indian National Army and the Japanese."

This, Sir, is the evidence which has been placed before this Court. As I said, my submission before the Court is that it was when the I.N.A. which was formed on the second occasion, felt confident that they would not be subordinated to the Japanese that they really fought as Allies. And hence it is that I submit to the Court that in so far as relations between the I.N.A. and the Japanese Army were concerned, it has been established by evidence that they were of the character which I claim for them, namely as allies. So far as the I.N.A. was concerned it was actuated by only one motive and one business, and that was to secure the freedom of India. That is the issue, which as I have said, does not actually arise, but which was bearing on the integrity of purpose of those who are on trial as members of the Indian National Army.

Then the next point to which I wish to call attention is the evidence before the Court that the Indian National Army was completely officered by Indian officers. True, an attempt was made by my learned friend in cross-examina-

tion as to the question of the High Command. I do not deny for a moment, though I do not understand or profess to understand very much the organisation of armies when they fight together for apparently the same purpose in any case but knowing what you do about the last but one war and the last war, when any question arises of unified command it serves very little purpose to suggest that in so far as the higher strategy is concerned, it was no doubt in the hands of the Japanese. No doubt probably they claimed at all events that they understood the art of war better, and that after all the Indian National Army consisted of men of not that standing. But apart from accepting better judgment on what should be the proper strategy, when it came to a question of internal administration of the I.N.A., it has been amply proved before the Court that the I.N.A. was entirely independent in its composition, including every officer. The evidence of Lt. Nag is in these terms:

> "The whole of the Indian National Army was trained by Indian Officers and not by the Japanese. It was entirely and throughout officered by Indian Officers and not by Japanese officers.
>
> The colours of the Indian National Army were the Indian National Congress colours i.e., saffron, white and green. Their badges were distinct from the Japanese badges."

And then he answered other questions which are immaterial namely that among the colours in the middle of one of the badges there was a brown star and it was resented by the personnel of the I.N.A. as it might be mistaken for the rising sun.

P. W. 19 gave the following evidence:

> "So far as I am concerned, I took instructions from our own Indian officers only and not from the Japanese. As far as I am aware, there were no Japanese in command in our area or otherwise in the I.N.A. I was

Assistant to Lt. Abdur Rehman who was left in charge of the rations at Falam. There was a long carry of 48 miles for rations The rations consisted of rice, salt, oil and sugar. Sugar was very scarce. The rations were very short consisting of rice, salt and a little oil. The Indian National Army was fighting under great hardship on that front. Whilst I was in the I.N.A., I carried out my duties faithfully."

The next point which I wish to make is that apart from what you may call the general higher strategy, the Indian National Army was completely independent. And though I am not anticipating a point which it will be my duty to argue, namely whether or not the question arose that people joined the I.N.A. because they might be wrose off as prisoners of war, the less said about it the better. The evidence clearly shows that the only ration that the I.N.A. had, apart from sugar and oil which was nominal, was rice, and that was the luxury which attracted men to the I.N.A. My learned friend will consider twice over before trying any such argument. The question really is that one set of men believed in a cause and the other set of men either from suppineness or otherwise did not, and nobody ever gave thought to the question as to whether one would be better off or not. One thing is quite certain: that apart from what actually happened by the conduct of the Japanese, those who joined the I.N.A. were certainly facing the possibilities which every soldier has to face unless he wishes to avoid it, which prisoners of war could, namely fighting with the opponent army. And, therefore, my submission to the Court is that this idea of contrasting the comforts of the I.N.A. and the comforts of the prisoners of war under the Japanese, is entirely overdone. It is entirely a quetsion as to what points of view appealed to one or the other sets of men, and therefore, Sir, my submission is that in so far as that is concerned, we have now been able to place before the Court the actual evidence on the question.

The next point is that the I.N.A. was a purely voluntary army and notwithstanding the attempt made, the Pro-

secution entirely failed to prove that it was not voluntary, because from time to time it has been proved before this Court by the speeches made by the accused and Sri Subhas Chandra Bose, which indicate that at every stage opportunity was given to every member of the I.N.A. to withdraw if he chose to do so. But the strongest evidence is this: It is common ground, apart from actual principles which have not been accurately proved, that only a portion of the volunteers could be armed, equipped and trained, because of the paucity of material, and that there was a large number of people who could not be trained and could not be armed for want of resources,—what is called the surplus volunteers. But I put it to you, Sir, as men of commonsense that it would require very much effort on the part of my learned friend to say that when they had more than enough men already, that they coerced more people to join the I.N.A. Or, in the language of Lord Shaw, I think it is a statement that stultifies itself because it is stated that 'we have enough men and we cannot arm them,' and yet it is alleged that you go on coercing people to join. I think it is a folly of which no decent human being would be guilty if he had a grain of commonsense. What has actually happened is that people have been punished for crimes of their own, and in order to appear glorious before this Court, they attributed it to pressure by the I.N.A. It is a very clever half-truth, which is not uncommon.

You get a fact which occurred. Then in order to appear virtuous he would say that he was punished to be coerced to join the I.N.A. A more ludicrous story could not have been presented to the Court, because in one case the witness admitted the reason why that took place. They were sent to the detention camp. Having been sent there, they were asked to surrender their ring-leaders. When they did not, ten people came and there was a free fight—300 on one side and 10 on the other. And for the Government to put forward this sort of half-baked story in order that the Court may swallow it passes one's understanding.

This is Lt. Nag: "I heard Subhas Chandra Bose state at a meeting held soon after the meeting of the 21st October 1943 that anyone who wished to leave the I.N.A. was permitted so to do."

P.W. 5: "Prior to my arrival at Port Dixon in Kuala Lumpur—at that time I was in the custody of the Japanese—the bad conditions were due to the Japanese. In January-February 1943 I saw Capt. Shah Nawaz for the first time when he came to collect volunteers. I am quite clear that Capt. Shah Nawaz Khan left it open to everybody to join the I.N.A. or not as they choose. I remember that he wanted staunch men who were prepared to lay down their lives for the freedom of India. I never saw Capt. Shah Nawaz after that lecture."

P.W. 24: "I reached Popa on the 25th or 26th February Col. Sehgal said at Popa that those who did not wish to stay in the I.N.A. and wished to go over to the enemy should tell him today. He will then make arrangements to send them in one party to the enemy, but they will not be permitted to take any arms or papers with them.. 'I do not want that men should desert in driblets.' As far as I understand it was Sehgal's intention that after the party went over men should not go over in driblets and so cause demoralisation."

D. W. 6: "The recruitment was absolutely voluntary. We had surplus volunteers whom we could not train or arm."

D. W. 7: "The Indian National Army was purely voluntary. As far as I am aware no coercive methods were used in recruiting. I am aware as a member of the Provisional Government that we declared war on Britain and America."

Then, Sir, there is one more statement referring to Capt. Dhillon, to which I wish to call attention. My submission to the Court is that in so far as the accused before the Court are concerned, they by their open speeches gave

everybody to undertsand that it was entirely their own choice whether to join the I.N.A. or not.

That brings me next to the evidence about the alleged coercion for the purpose of compelling men or inducing men to join the I.N.A. The position, Sir, is this with reference to that. At the time when the question arose as to the admissibility of the evidence, it was candidly stated by the Advocate-General that he did not rely on Section 10 but the way in which it is sought to make it relevant is this. He said that the accused did not participate in it, did not do it, did not encourage it. But that they knew about it.

The matter did not rest there. When they asked other people to join the I.N.A., they gave a veiled threat; "Remember if you do not join, what hardships exist." And the matter was further strained before this Court by saying—meaning thereby among other things—that there would be personal coercion. It was on that statement that this honourable Court was pleased to admit the evidence. The attempt was made to show that the accused made this veiled suggestion. That attempt has completely failed because Capt. Dhargalkar who was called to give evidence in support of this, fell through. I shall read that part of his evidence to show that he completely collapsed in what he came to prove. He came to prove that the three accused, or some of them, went with the other officers. He came to support what the Advocate General was instructed to put forward, namely, that he was given the alleged veiled threat. When we came to cross-examine Capt. Dhargalkar, he said: "I was never asked by anybody. I was never addressed by anybody" and the more significant thing is, he ended by saying: "I cannot state to the Court who said what to anyone." The net result of his evidence amounts to this that the Government having undertaken to this Court to prove that the veiled threat was given in that form, and that meant evidence possibly relevant in the eyes of the Court, the evidence was allowed to be given. But in the

light of the evidence of Capt. Dhargalkar, there is none in which any allegation of a veiled threat exists. I therefore ask the Court to hold that evidence as completely irrelevant because it was admitted on this provisional promise, namely that it would be proved that there was a veiled threat given by the accused, because there is no other way in which it could be made relevant. There is no charge against the accused of any personal cruelty of any kind. There was no charge that they encouraged it, and the mere fact that they had knowledge would not be anything—even that, they have failed to prove. When I pointed out that mere knowledge was not enough, my learned friend added a further point, which I presume induced the Court to allow that and that is when they used the words which they are alleged to have used—"If you do not join remember the hardships"—meaning thereby that in as much as they knew that wrong methods were being adopted, they threatened the men by saying wrong methods would be adopted in their case. That I submit is the only process of reasoning by which he attempted to make his evidence relevant. My learned friend has completely failed to establish either the knowledge or alleged threat, and for these reasons, Sirs, I submit that this evidence should now be excluded, and I have prepared a petition so that it may remain on record for my submission.

The learned Judge Advocate told the Court on the occasion of the question of admission of the evidence:

> The learned Advocate-General really bases his case on the speeches of the accused which he will prove showing, as he says that the accused referred to the hardships which would be inflicted on prisoners of war unless they joined, and thereby implying that they had knowledge of the methods by which he alleges that recruiting for the I.N.A. was being carried on.

At the same time, now we have arrived at a stage when I respectfully ask that the Court should rule that that evidence should be entirely disregarded, because there

is no proof of the promise on which that evidence was submitted. That is the formal application I make to the Court.

Judge-Advocate: Do you mean that you are asking us to make a decision on this now?

Counsel for Defence: On this point.

Judge-Advocate: I am afraid it is not at all procedure to make piece-meal decisions on parts of the case, without hearing the learned Advocate-General and without hearing me. That decision will be made in due course but I must ask the Court that they should go on now without making any piece-meal decision at this present stage.

Sri Desai: I shall leave it at that. I thought that I would save the Court, and perhaps incidentally myself, the necessity of having to go through that evidence, to show how utterly useless it is. But that being the view of the Court, I will not pursue it.

That brings me to the next question. My submission is that the basis on which that evidence was admitted has completely disappeared; and in as much as it has disappeared it should not be taken into consideration in this case at all.

The only reason why I thought it my duty to call the attention of the Court at this stage was that you might have to go through the evidence and think if it is relevant.

The first witness, to whose evidence I think it necessary to call the attention of the Court, is Capt. Dhargalkar. This is what Captain Dhargalkar said in his examination in chief:

"I do not remember Lt. Dhillon being there, but I remember Capt. Shah Nawaz Khan and Capt. Sehgal coming there. I recognize both these officers as accused before the Court. Neither of the two accused ever spoke to me, but discussions usually took place and nearly all the discussions were concerned with our join-

ing the I.N.A. I was present at these discussions. It is very difficult for me to quote the exact words which Capt. Sehgal and Capt. Shah Nawaz Khan said, but the gist of the thing was: 'Why don't you all join the I.N.A. rather than waste yourself living under these conditions?"

That is really the whole point. Let me examine whether the promise is fulfilled even in the examination in Chief. "If "conditions" merely meant conditions as prisoners of war, whether for the time being under the I.N.A. or the Japanese, that is not a matter of charging the accused. But I suppose my learned friend will use the word "conditions" to mean almost anything, meaning thereby that "some people did something to somebody else and that will be your condition." I submit it does not carry the matter far enough.

I would then call attention to the cross-examination of this witness. He says:—

"I saw all the three accused on several occasions. I saw them anything between 20 to 50 times. I only spoke to Capt. Sehgal a couple of times; I do not remember having spoken to Capt. Shah Nawaz Khan or Lt. Dhillon. I spoke to Capt. Sehgal in Col. Bhonsle's house. I cannot remember any other occasion. I was present at fifteen occasions at which discussions took place. Capt. Shah Nawaz may have been present about twice and Capt. Sehgal was present about the same number of times. This was in a separation camp at Badadari. There was one huge camp at Badadari and also a separation camp. I was in the separation camp. The whole of the Badadari Camp was the Indian National Army camp. We were taken there by Capt. Mohan Singh. There were about sixteen of us living in the room. I did not take part in the discussion nor was I addressed by Capt. Shah Nawaz or Capt. Sehgal. That is all that happened during the discussion."

Then he goes on to say:

"Capt. Shah Nawaz Khan came there, but I do not know whether he came to see Capt. Sher Dil Khan. I was not invited to a discussion, I was living in the room and I overheard certain conversations. I cannot remember the words of these discussions accurately but I remember the gist of them. The gist of the conversation included many other subjects other than the Indian National Army. I was addressed but not by any of the officers present there. Capt. Shah Nawaz Khan was speaking to 16 other people. The gist of his conversation was: "Why do you not join the Indian National Army?" I remember that occasion to the best of my knowledge. It may have been any time in that month. I cannot remember all that he said. I cannot say exactly what he said."

(You will see, Sir, a change in the gist. There was no question of what consequences would follow.)

"I cannot remember exactly what he said. I cannot single out from the others what Capt. Shah Nawaz Khan said. My answer is the same with regard to Capt. Sehgal. What I told the Court is the general impression without knowing who said what."

This is the evidence of Capt. Dhargalkar, and I respectfully and emphatically submit to the Court that the promise on which that evidence was admitted remains unfulfilled; and in as much as it remains unfulfilled, my submission is that the evidence should be disregarded completely.

Now, with that submission and in view of the record, it is my duty very briefly to examine the evidence which has actually been given, and I will preface the examination with this remark. This is a case where in some instances what is called a half-truth implies an untruth: e.g. there was a detention camp where people were taken if they were

guilty of acts of insubordination or any other act contrary to the discipline of an army. Having been taken there, there was no doubt a certain amount of tasks and fatigues they were asked to do. That is perfectly true. but that having been done, the man wants to make a martyrdom of it. I will tell you why. He says he was taken there and he was asked to join the I.N.A. It is all. I submit, embroidery of the case, and I will ask the Court to examine that evidence in that light, and in one or two instances I shall be able to show that reluctantly he almost admitted the case I put to him, that he was sent there because he was guilty of insubordination. People very picturesquely said they were asked to pick up one end of a pole and every time a man followed them or hit them—I think the very exaggeration defeated its own purpose. I do not think any Court will believe such an absurd story. True, he was taken there, and no doubt he had to do a certain amount of fatigue. No doubt it may be that a non-commissioned officer thought it was below his dignity to pick up things which were necessary. In fact you might remember with what amount of reluctance the witnesses gave the kind of evidence before the Court.—I would recall a picture of one of the witnesses when I told him that this was only for the purposes of manure and there was the evidence of a garden,—it almost taxed one's patience to be able to get out of him that evidence, and get him to admit those facts; and even then he kept on saying "Oh, there was a road there and in between there was something and if you call it a garden it is wrong and so on." The fact remains that the witness was taken there for some act of insubordination; he was put to a certain amount of task, but then in order to glorify himself as a martyr, he now comes forward before this Court and says "I was taken there because I did not join the I.N.A." And when I cross-examine him as to what particular position he held with particular distinction, and what distinguished career he had, and he ultimately collapses and admits he was an ordinary soldier. To think therefore, that stories of this kind would pass

muster before a Court composed of men of affairs and experience, I submit, will not do.

I call attention first to Wolit Bahadur, P. W. 14. The kind of picture he gave—this method of carrying baskets at the end of a pole—I do not suppose it is any great innovation or torture, unknown in India. The way in which he described it, and if he was not giving evidence before men of experience in this country, was almost insulting to one's intelligence. After all it is a common method of carrying a load on bars with a man at each end; and if he objects to carrying a load like that I am very sorry for him; but I am afraid he has to labour, and if he has to work, he has to work; and the more we learn to do manual labour, I think, the better for men of my country.

And then he said—it was a ridiculous story—he carried out the order and picked up the cow dung. There came a road. There were six men who stood just for the purpose of giving a stroke as he lifted the load. That I submit defeats itself. In cross-examination—that is where I wish to call attention to a few passages—this is what he says:

> "He said that we had now fallen from the English into the Japanese hands and we have to carry out their orders and do their fatigues. He told us that the British had run away and left us there. He said that our home was in India and we have to join with other Indians to fight for India. He also said that for this reason we should join the I.N.A. He also said that the I.N.A. was being formed to set India free. He said that for this reason we should join the I.N.A. About one or two men said that they did not know anything about the I.N.A. and they were not going to join it. At that time we did not know what this I.N.A. was. I know Jamadar Til Bahadur Adhikari."

This is a very important thing. They are the people who are said to have come in this party to attack this gentleman and his friends in order that they may be coerced to join the I.N.A. It would be fortunate if one can think a little in advance. He admitted that every single

one of them who took part in this raid to induce this gentleman and his friends to join the I.N.A. were all men respected in their regiment and respected in the parts of the country from which they came. If he had only realised what it involved, he would probably not have admitted it.

"I came to know that the I.N.A. was being formed. I know Jamadar Til Bahadur Adhikari. Jamadar Puran Singh Khawas was a man who was respected by our unit and so was Jamadar Til Bahadur Adhikari. Jamadar Til Bahadur delivered only one lecture at which I was present. He also told us about the object of the I.N.A. which was the same as Puran Singh had told us. When Til Bahadur delivered the lecture there were about 600 men present."

He admitted to me that they were being asked in the ordinary course to join the I.N.A. asked by people whom he admitted to be respectable and the point in asking for the admission is this, that those were among the people who came armed with a view to attack these innocent men in order that they may join the I.N.A. I make a present of that kind of story for your acceptance.

Then, Sir, comes in very common parlance the cat out of the bag. "Those who did not join the I.N.A. were required to do fatigues for the Japanese. Those who joined the I.N.A. were not required to do fatigues for the Japanese."

Posecution Counsel: I am afraid my learned friend is under a misapprehension. He gave no names.

Defence Counsel: In his examination in chief he gave the names of the people who formed the party of attackers. It comes in cross-examination.

Prosecution Counsel: He does not say that these were the people who came to assault him. I know my learned friend put those names to him. No such questions were asked that these were the people who were in the firing party.

Judge Advocate: That certainly was not said, Mr. Desai.

Sri Desai: The point of the argument will be perceived, name or no name. "Those who did not join the I.N.A. were required to do fatigue for the Japanese. There was dispute when we refused to do fatigue duties for the Japanese. The leaders whom I have named told us not to object to the fatigue. In spite of their persuasion some of us did not obey. We reported that we will do fatigues for the Japanese but we have nothing to do with the I.N.A. The gaurd was sent because some of us did not obey". That is the point. The point is that it was not because they were to be persuaded to join the I.N.A. that the guard was sent. On his own admission they did not obey to do the task, they were sent on and that destroys the whole of that evidence, name or no name. His whole purpose was that these people came on their own with a view just to educate them, because they would not join the I.N.A. If my learned friend will follow the process of cross-examination and the admission made by Wolit Bahadur I only point out that it was upto the witness to say that they were not in the firing party.

Judge Advocate: It is you here who is in the wrong. You have said that these men were in the firing party, whereas it was pointed out that they were not.

Sri Desai: There is the evidence in chief. I took the names from the summary of evidence. Because of that ruling the names were not allowed to be given. Whether the witness proved or failed to prove that the attack took place, because they would not join the I.N.A. that is the true issue, and remembering that to be the true issue, I beg leave to read where I left, and that is this: "There was a dispute when we refused to do fatigue duties for the Japanese. The leaders whom I have named told us not to object to do fatigue. In spite of their persuasion some of us did not obey. We reported that we will do fatigues for the Japanese but we have nothing to do with the I.N.A. The guard was sent (that is the material point) because some of us did not obey." You cannot get out of that. In other

words the story that the guard was sent with a view to shoot them because they did not join the I.N.A., is entirely destroyed by this evidence. "The guard was sent because some of us did not obey. The guard came to seize the ring-leaders." That is precisely my point. I said they were all guilty of one or other offence against discipline, and hence action was taken against them, and this is the best illustration. Of course people get warned: after one man has been cross-examined you may not get the same type of admission. But here you have the clearest possible admission, the negation, the complete negation that any attack was made on them, because they did not join the I. N. A. Of course they always repeat like parrots, when it becomes necessary: that is what happens. But occasionally there are lapses. "The guard was sent because some of us did not obey. The guard came to arrest the ring-leaders. We were about 550 men. Some of the men had a dispute with the guard. The guard stopped us from doing this and then fired in the air." What possible course forsooth—it was sent for the purpose of asking them to join the I.N.A. and they should have fired in the air! The whole point is that these were recalcitrants, a disobedient crowd. They were asked to surrender. As a warning they fired in the air. They would not obey. Of course the trouble took place. "When we did not obey the order of the guard, they fired. The guard did not prevent us from doing fatigue but they spoke to us about I. N. A. which we did not obey." All this rubbish is difficult to understand. "First they fired in the air, and when we did not obey ultimately they fired at us. About two or three men were injured after the firing. Then we pursued the guard. The dispute between the guard and ourselves was that we resented the appearance of the guard during the lecture time." I do not know what it means. Whatever that means, they know better. As I said here, it is a complete demolition and the best illustration of how the false is mixed up with the true. There is no doubt that there was a scuffle. That is not denied. But they want to annex the scuffle to something else. That is a piece with all the

evidence with which I am familiar. You get hold of a known fact which is not disputed, and then put it on to something else. My submission to the Court is that this evidence alone is sufficient to discredit the kind of evidence the Government has put forward with a view to show that atrocities were inflicted for the purpose of joining the I. N. A. As to the tortures, they were of two kinds. Regarding one, I have got definitely out of the mouth of the witness himself that they objected to the fatigue. They were persuaded not to do it. The very leaders whom they respected, persuaded them not to object to do fatigue. They were again asked to surrender their ring-leaders. These people would not. They fired in the air and ultimately they fired at them. Three people died and there were 550 of them. Such evidence, can my learned friend or any gentleman in his very high position ever place before the Court, name or no name?

Prosecution Counsel: I only corrected a statement which was not justified by the record.

Sri Desai: I admit that I was in the wrong. I say the point of the argument is really this that the witness who came to swear false to the fact that the party was sent armed with a view to fire at them in order ot compel them to join the I. N. A. here stands on his own evidence self-condemned. He admits that the purpose was different. The occasion was different, and that disobedience was the only cause. My case is that the cases which they have selected are cases of a similar kind where people undoubtedly were dealt with for breach of discipline, but which they now attribute to a false cause, namely, their refusal to join the I. N. A. The next is the case of Muhammad Hayat. That is the case in which we said that because they killed some cows, a quarrel arose and hence a scuffle. It is true a scuffle took place. The question is—was it with a view to compel them to join the I. N. A. That is where I say they get hold of an admitted event, or a more or less admitted event, and annex it to a false cause. He said:

"The Camp Commandant was Captain M. Z. Kyani, who was succeeded by Col. Shah Nawaz Khan. I heard Col. Shah Nawaz Khan lecturing to the camp. I was not present at the lecture he delivered in the camp, but I was present at the lecture he delivered in the mosque. He said that Sikhs and Hindus have already volunteered, and that the Mussulmans should also join. He said: 'Muslims must join the I. N. A. because when the Hindus and Sikhs go, they will trouble you in your homes in India." He did not threaten us with force but he said that we ought to join the I. N. A. He did not say that he only wanted sincere men. He said 'I will not give any sort of trouble to you, but you should volunteer. I want true volunteers'. After 'Dua Khair,' we said that we will not join the I. N. A. We meant by that that none of us who were present there had a right to join the I. N. A. There was no charge against the men of my unit of having committed theft of seven cows belonging to civilians, and of having slaughtered and eaten them. I deny that. That charge is a lie and that the cows were eaten is also a lie. I am shown my additional statement in the summary of evidence. I admit that I said in the summary of evidence that Major Aziz Ahmad told us that we were to go to the concentration camp because we had killed a cow."

That was at the time they were sent. Remember what was the contemporaneous statement made. I want you to remember that. The Court would have no doubt that that was the real cause of the dispute, and that joining the I. N. A. or not joining the I. N. A. was not the cause.

"No skins or bones were found, and no investigation was made. I never volunteered for the I. N. A. The Badadari camp was a mixed camp of volunteers and non-volunteers in July 1942. Neesoon camp was also a mixed camp....There was no difference in rations for the volunteers and non-volunteers. In July 1942 there was no separate treatment for volunteers in the Badadari camp. I was carrying on anti-I. N. A.

propaganda. There was no charge against me of killing or stealing a cow when I was removed from the Badadari camp to the concentration camp. Aziz Ahmad never told us that we were being sent to the concentration camp because we had killed a cow. I am again shown my statement in the summary of evidence. I signed my statement. It was read over to me. I made this statement about Major Aziz Ahmad having told us that we were all to go to the concentration camp because we had killed a cow."

In other words, at the time when he was taken, it was proved from his own mouth that he was definitely told that the reason for his being sent was the killing of the cow.

"On the day I went to the concentration camp there were approximately 60 or 70 men there.....I said that after two or three days men of my unit were sent away from the concentration camp. I and 11 other men were kept there. After our people went away, there were approximately 60 or 70 people left. They were all non-volunteers. I am talking of the month of July 1942."

Then comes the most tell-tale thing which any man of common-sense will understand:

"I was released from the concentration camp after 21 days because I had become very weak."

The whole point is this. Any man reading between the lines will be able to see that these people were taken to the concentration camp because they were charged with having stolen and killed a cow. He himself admits that it was a charge made at the time. Major Aziz Ahmad said 'you have to go to the camp, because this is the charge against you.' After investigation, he was released after 21 days. Is that the real story, or what he now says is the real story? It does not, show that they were oppressed or coerced to join the I. N. A.

There is one ordinary canon of reasoning and common sense. Is the Court to accept the story he said at that time or is to accept the story told now? I submit that at that time nobody imagined that anybody was going to make anything out of this incident for the trial against some people in future. The question is, which of the two stories is likely to be true, and I respectfully submit to the Court that there can be only one conclusion. The story he told then is the true story, and not the story he tells now. That is my submission with respect to this witness.

The next witness I take is Ahmad Nawaz, P. W. 10. Every man has to undergo some sort of punishment for an offence. This witness is taking the story as it occurred, and adding to it so as to make out that what was done to him was a punishment to induce him to join the I. N. A. The only grievance of this gentleman is that he was asked to carry cow-dung. It was not after all such a serious punishment as he tried to make out. When I asked him whether he was asked to mix cow-dung with soda-ash, he said that in his part of the country they did not do so. The time has not yet come in this country for the use of every kind of mineral manure, of any other kind of manure except cow-dung. I asked him whether it was not intended to be used for the purpose of manuring the garden, and it took a very long time before we could get anything at all form this witness. The demeanour of this witness, and his behaviour to the Court stands condemned.

I am now reading part of the cross-examination:

"I do not know what the cow dung was taken for. I only know we were made to take it as a punishment. We stacked the cow-dung near a road in the camp and on both sides of the road was the garden. We were never told to powder the cow-dung for manure. It is correct that I said that we mixed ash with the cow-dung but I do not know for what purpose it was used. I only did it as a punishment."

To this man everything is a punishment. When this gentleman was asked to mix some soda-ash with cow-dung for manure, he thinks it is by way of punishment. He is indignant when he is asked to do something and thinks he was asked to do it as a punishment. He says:

> "As a farmer, in our own home, we only use cow-dung as manure and we do not mix ash with it. Only for three hours on the first day I did this work of carrying cow-dung and stacking it near the garden. It was stacked at a distance of about 10 or 12 yards from the garden. For the remaining five days we were digging and levelling earth and preparing garden plots."

When you come to analyse the facts, the indignity this witness comes to nothing. He was asked to do the ordinary work of preparing garden beds for the vegetable garden and mixing some manures. So far as the morning is concerned, it only lasted three hours of his life time. If this is what is called austerity, I submit to the Court it is a ridiculous type of austerity. A man is asked to make beds in a garden and prepare some manure, and he imagines it to be a punishment. He may think so, but it is for the Court to say whether it is so. Does the Court believe that it was an ordinary piece of work, or it was an oppression, coercive methods, and I do not know what other language is used to describe it. Is it a torture to prepare beds and to prepare manure? I submit with great respect it is a ridiculous kind of evidence which is put forward as an item of torture, and for what purpose?--for the purpose of making this gentleman join the I. N. A.! Does this stand to reason and common sense? I submit with great respect, that in spite of the picturesque language used, the Court will not accept the version of the witness. It is a ridiculous thing. He was asked to do ordinary fatigue. This is legitimate work which ought to have been done willingly and it is ridiculous to suggest that this was a kind of torture used to induce or coerce the witness to

join the I. N. A. That, Sirs, is the evidence of Ahmad Nawaz.

Then, take the next witness, Havildar Muhammad Sarwar. He said, "Everybody refused to join the I. N. A. The Jamadar and Subedar were armed with pistols and they took them out and started firing on us, and ordered the guard also to fire on us. The guard consisted of approximately 14 men. They started firing. Two of us were killed.....Everybody said Allah-o-Akbar." Now, I will read from the cross-examination of this gentleman. He said: "I was for three weeks in No. 4 hospital. It was a very big hospital. There were patients of all kinds there. I was taken to the hospital. I do not know who took me, because I was unconscious.....There was an officer to whom I said that I was willing to join the I.N.A. The only force that made me join the I. N. A. was that I wanted to escape this bad treatment and bad food. When I joined the I. N. A., I came to know that they were trying to free India." And this is the gentleman who says that there was a regular firing in order to make him join the I. N. A. He goes on: "I knew I was expected to go and fight. I knew it was a question of life and death. I thought that death was better than these troubles. I had no faith that they would set India free. I had every faith that if I went to the front, I might be able to go to the other side, because we had so many hardships otherwise. At the place where we were first, there were numerous other people besides the 300. I do not know the Camp Commander's name. The Unit Commander was Lt. Purshotam Das. That was the Japanese Prisoners of War Camp. We were split up into parties for the purpose of fatigues. On the day prior to the firing accident, we were not divided into parties of 323 for fatigue purposes. We were not asked to form a party of 323 men. We were not given an order. I do not know anything about being asked to surrender our leaders. I never heard of it. It is not true that Lt. Purshotam Das advised us not to resist. In the party which came to the Camp there was one Muham-

medan Jamadar. He was second-in-command of the guard. There was a scuffle between the men of my unit and the guard after the firing had taken place. Only one man of the guard was killed. The guard consisted of about 300. The name of the guard who was killed was Sardar Singh, who belonged to the Kapurthala Regiment." That will show who attacked first. I leave it to you, Gentlemen, to judge who was the attacker and who was the attacked. And remember this that they were in a party of a few hundred, whereas the guard consisted, as he puts it, of 300 men. "Because we refused to join the I. N. A., they started firing." That is the picture which we are asked to accept. I submit with very great respect that the story is a most incredible story. There was no conversation and they at once started firing!

Now, Sirs, that is the story which is presented to you for acceptance, and I ask the Court not to accept it because it is a ridiculous story. What is the idea of firing at the men whom they ask to join the I. N. A.? What do you gain by it? You gain this kind of soldiers with a view to fight! My submission to the Court is that there was this scuffle which he reluctantly admits, and evidently they were the first attackers. But they have employed a little story by means of which they say that there was firing on them. If the Counsel thinks that he can walk away with this story, I submit he is mistaken. But when you come to torture, I ask, is it supposed to be a torture? It was an ordinary fatigue duty. In this connection, I would like to call the attention of the Court to the Geneva Conventions, Articles 27 to 34, with reference to the work of the prisoners of war on page 298. I am talking of 1929.

> "They should be kept according to their rank and if they are physically fit they may be employed by private individuals, but the captors must assume entire responsibility for their maintenance."

Prosecution Counsel: I am afraid I must interrupt. The evidence is not as my learned friend reads it. The evidence is not that the guard was killed first.

Sri Desai: What he said was: "The name of the guard who was killed was Sardar Singh. There was no other member of the guard who died before Sardar Singh was killed." I had not the least doubt about it.

The point that I submit to the Court is this. The witnesses fall into three types of classes. The first category belongs to the cow-killing incident. The second that the incident was with reference to refusal to do fatigues. The third relates to the incident of refusing to form parties for fatigues as required by the Japanese, whose prisoners they were. As a result of these three incidents, certain accidents occurred. I submit to the Court that the Government had definitely failed to prove any torture for the purpose of joining the I. N. A. Each of these accidents is attributable—in two cases almost—to an admitted fact. In one case it is due to the form which the attack took. With reference to the other witnesses, the less said the better. All that they have said was that they were asked to do certain duties which they thought was an indignity, which they were asked to do, which, I submit, is ordinary decent labour. I know many men of higher rank who do gardening as a matter of honourable occupation, and as a change of occupation from ordinary work. What these gentlemen were really asked to do was gardening, and they seriously come here and say what an indignity it was to ask a soldier to do gardening. And that is why he refused to join the I. N. A. The Counsel has entirely failed to prove what he set out to prove, and I feel the Court should hold if it were necessary—according to my submission it is not necessary at all—that it has not been proved, apart from what is read or stated or alleged, beyond any reasonable doubt, that any torture was inflicted in order to join the I. N. A. That, Sir, is my submission on that count.

That is all that I wish to say about the evidence on the subject of atrocities alleged to have been committed on these men to join the I. N. A. With reference to the point that I mentioned in the morning as regards cases which might possibly be relied on, I will give you a list

of the three cases which may be relied upon and give you my remarks on them. Before that I wish to make a submission. I will make a request at a later stage but I wish to mention to the Court in so far as any new authority is cited by my learned friend I do not want a general right of reply but I will ask the Court in the end that on any new law that may be cited I may be allowed to give a reply because I could have no opportunity even by anticipation of doing it. I will make that request more formally towards the end. The three cases which may be relied upon are Regina vs. Lynch (1903) 1 King's Bench, Regins vs. Jaegrae (1907) Appeal Cases p. 346 and Regina vs. Casement (1917) 1 King's Bench. I do not wish to address you as if you were a high court, and therefore what I will do is this. There are two points which distinguish these cases which I will briefly state. They are cases of an individual being charged under the English law for an act of treason; they were not cases of men who were members of an organised army and of an organised Government. The second distinguishing ground is that in these cases there was no question of what I have submitted shortly as double allegiance. Therefore my submission will be that if these cases are relied upon this is the answer that I have got with reference to them. I will now go on with the regular trend of my argument.

The next point which I have to deal with before the Court is the evidence relating to the charges of murder, but I will take them all together without attempting to distinguish them. But I distinguish them under two heads: One is with reference to the four persons alleged to have been shot on one occasion and Muhammad Husain, the person shot on the second occasion. I will first briefly state the case as I desire to present to the Court, and then deal with the evidence. It is a matter in which with due submission I probably will call attention in some greater detail to the evidence of three or four witnesses. As to the others, I will only make a submission as to what they said.

The position with reference to that is this. As regards the four persons there is a crime report and therefore up to the point of punishment there is evidence before the Court. As regards Muhammad Husain there is no crime report. In fact as regards Muhammad Husain there is no document whatever relating either to the sentence being passed or the sentence being carried out. Further, there is not even a casualty record in either case that I find on the record. As to Muhammad Husain the only answer given by one of the witnesses as to why a casualty report was not made was that they were moving from Popa that day, and then when I further cross-examined him—which you will find in the cross-examination when I come to it—he has given no adequate explanation for the absence of the casualty report. There is this further evidence—I am only anticipating it—that in the case of Muhammad Husain there are three persons who are alleged to have shot, —Jagiri Ram and two others, whom Jagiri Ram himself did not know. I do not wish to enter into details at this moment except when I read it, but I wish to point out the salient features. It is said in the evidence that Muhammad Husain had three shots on his heart or near thereabout. It is further said in the evidence—he said this—that there was a tear in the shirt; and further in answer to the court, which is a most material point, he said there was no blood of any kind or sort. That is the state of evidence with reference to Muhammad Husain.

And now I will deal with the two sets of cases. There is one other ruling which I should have mentioned and that is that there is in evidence before the Court that Lt. Dhillon who is said to have signed and watched the sentence carried out was in a state of complete collapse of health and on that the document before the Court is Exhibit VVV. And the date of that document is 6th March 1945, the date on which it is alleged this execution was carried out. I am reading the relevant part of that document which is at the bottom.

"Jai Hind—I think most of your queries have been answered in this order. Others I will answer when I come tomorrow. I ought to have come today but last night I went to check certain defences and on my arrival back I felt very weak, so weak that I have never felt before throughout my life. Major Shankar gave me an injection today though for a complete course I must get 12 here when there are none available. I will get one tomorrow."

My case is that so far as carrying out the sentence on the four persons is concerned, though in fact the order was passed, it was never carried out. Not only that, but I will be able to point out from the evidence on record that there are many other similar instances, sworn to and admitted by the witnesses for the Prosecution. That is in outline why I submit that the case in so far as the execution of the sentence is concerned, is not proved. I may go a little further and state to the Court that there is no presumption that because sentences were passed they were therefore carried out. The charge of murder has got to be proved by proving completely what is called the corpus delicti of that particular person. And I will say that if there is a reasonable doubt in your mind that the Prosecution has failed to prove the actual execution of the sentence, my clients are entitled to the benefit of that doubt.

That is the position with reference to the executions. There are four witnesses with reference to Muhammad Husain. As regards the first witness Havildar Ghulam Muhammad, the evidence need not be read to the Court because all that he says is that he was brought up before Capt. Shah Nawaz, which in fact is not denied. There is this is Ghulam Muhammad's evidence:

"I know Havildar Ganga Saran. The First Battalion Commander reported that he (Ganga Saran) had refused to obey his orders. He was a sub-officer in the I.N.A. He was produced before Col. Sahgal for

this offence and was tried and sentenced to death. He was afterwards pardoned and released."

Havildar Ganga Saran himself in his cross-examination has admitted that as a fact.

The next witness is Sepoy Allah Ditta (P. W. 24). He deals with the earlier part of the story, namely his intention to desert. This is what he says:

"Muhammad Hussain said 'I had a few difficulties and therefore I intended to desert'. But no inquiries were made into his complaints. Muhammad Hussain was told by Col. Shah Nawaz: 'You are sentenced to death by shooting because you intended to desert yourself and were persuading others to do the same. Therefore you are not pardoned.' I heard Col. Shah Nawaz say: "Put off the case to the Regimental Commander." (Note by Court: Witness used the words in English). Then we all three of us were sent out. I recognise Col. Shah Nawaz Khan as an accused before the Court. We waited there for ten minutes and were brought back to Brigade Headquarters. Muhammad Husain, Jagiri Ram and myself came together back to Brigade Headquarters. Muhammad Hussain and myself were put back in the same cell in which we were before and Khazin Shah took away Jagiri Ram. The same day at about 5 p.m. Sardar Muhammad, Adjutant of our Battalion and Aya Singh took away Muhammad Hussain. I have never seen Muhammad Hussain since then."

Then, Sir, in cross-examination he said:
"No decision was arrived at either in my case or in the case of Jagiri Ram."

The Court will remember that there were three people, and it is common ground that as regards two the sentence was not carried out.

"It is true that all that Col. Shah Nawaz Khan said was: "You deserve to be shot." Col Shah Na-

waz Khan said that rebels like you will be sentenced to death by shooting. Col. Shah Nawaz Khan told Muhammad Hussain: "You yourself wanted to escape; secondly, you have tried to persuade others to escape; therefore, you are a rebel to the I. N. A. and sentenced to death by shooting." I saw Col. Shah Nawaz Khan write something on the crime report. How could I read the crime report without picking it up from the table? I do not understand English."

I come to the part of the story which in itself has not the same importance as what it indicates, showing that the witness was a completely factual witness. The man does not know English and yet he says "he was writing a crime report", and the object of the cross-examination is to show that he told a set story which he himself could not have possibly seen or done, and that is the kind of witness he is. That is then object of that part of the cross-examination.

"I saw Col. Shah Nawaz Khan write something on the crime report."

The man says he does not know what is crime, but he was told what is a crime report. Yet he is asked to tell a set story that there was a crime report which Col. Shah Nawaz Khan was actually writing, because he was called upon to prove that it was a crime report and sentence was written on it.

"I saw Col. Shah Nawaz Khan write something on the crime report. How could I read the crime report without picking it up from the table? I do not understand English. I do not know what he wrote and where, because I do not know English and I was not reading the crime report at that time."

And the only re-examination is:

"The crime reports were lying on the table and Col. Shah Nawaz Khan read them out as he spoke to us

individually. He wrote on the crime report which had already been drawn up."

That is his part of the story. Then we come to the actual evidence of persons by whom sentence is said to be carried out,—Jagiri Ram. You have seen him in the witness box. He is in the Nursing Department. He admitted to the Court that he had never handled a gun in his life, or a rifle, or any shooting instrument. But in order to give the colour of truth, Jagiri Ram is made to say this: "I was unwilling; I do not know how to shoot; I have never handled a shooting instrument, but a gun was put on my shoulder...." I ask you, Sirs, to give me the benefit of any description on his part rather than attempt to construct the story for him as if he did so. Then he put the gun here and the trigger was pulled and it seems that this untutored rifleman was extraordinarily accurate, that along with the others all the three shots lodged in the chest of the deceased. Sirs, it will be for you to judge the story. I am going to read out only that part of it which is material:

..."I knew Muhammad Hussain and Allah Ditta. Muhammad Hussain, myself and a Garhwali talked about escape when we were in Popa Hill area. While we were talking of escape Khajin Shah sent an orderly and ordered us to report to Battalion Headquarters. Muhammad Hussain said that he had mentioned to Jagiri Ram and Alla Ditta jokingly about an escape. Khajin Shah questioned me and asked if they mentioned this jokingly. I replied that I had no proof of his intention to escape, but he mentioned it jokingly to me. Mohd. Hussain and myself were tied to a tree near the Battalion Headquarters, while Khajin Shah was questioning us. Khajin Shah questioned me as to who was trying to escape and I said that I did not know the name of any one who was trying to escape. Then Mohd. Hussain was questioned. He also said that he did not know anything. After sunset Khajin Shah

took Mohd. Hussain and myself to Brigade Headquarters. When I was taken to Brigade Headquarters, Mohd. Hussain, Khajin Shah and one sentry were with me. Brigade Headquarters were near a nullah. On arrival at Brigade Headquarters, Khajin Shah went to a telephone and after that Alla Ditta also arrived at the nullah. After that all three of us, Mohd. Hussain, Alla Ditta and myself, were put in the Quarter Guard and our hands were tied. On the following day, we were brought before Col. Sahgal. Col. Sahgal questioned me as to whether I intended to escape. I said no, I did not intend to escape. During this conversation with Col. Sahgal, other people present were major Negi and Khajin Shah. Col. Sehgal asked me if I had reported to any one after Mohd. Hussain had mentioned to me about escape. I said I did not know anything about Mohd. Hussain, and I did not reply to any N.C.O. I worked with my Medical Officer. Then, we came out of the room and went back to the Quarter Guard. Then Lt. Aya Singh of Brigade Headquarters gave each one of us a beating and said that he would release us if we would tell him the names of the people who intended to escape. I continued to say that I did not know. Next day we were taken to Divisional Commander Shah Nawaz Khan. We were accompanied by Major Negi, Khajin Shah and a sentry. All three of us, myself (Jagiri Ram), Alla Ditta and Mohd. Hussain, were lined up before the Divisional Commander. The Divisional Commander asked me to speak the truth whether I intended to escape. I said no intend to escape. Capt. Shah Nawaz Khan asked us why we did not report the matter. I said that I did not know anything about it, and I did not intend to escape. He asked if there was any officer or N.C.O. near me. I said no, I was working with my medical officer. Then Captain Shah Nawaz Khan asked Alla Ditta: "When Muhammad Hussain had talked to you about escaping, did you report to any one?" Allah Ditta said: "I do

not know anything about Mohd. Hussain's escape; I thought it was a joke, I do not know anything about it." Captain Shah Nawaz Khan then said to Allah Ditta: "You are an N.C.O. Why did you not report?" Alla Ditta begged his pardon and said that he did not know anything about Mohd. Hussain. Then Capt. Shah Nawaz Khan questioned Mohd. Hussain, and Mohd. Hussain replied that he was in difficulties and that he intended to escape and asked to be forgiven, Capt. Shah Nawaz Khan then told him: "You are not for our country; you are our enemy. I will give you death by shooting," Then Mohd. Hussain asked for forgiveness, and said he was prepared to go anywhere he was ordered. Capt. Shah Nawaz said nothing to this."

The whole importance of the question is, whether in fact any sentence was actually pronounced. But, whether or not it was pronounced, the ultimate issue is, whether it was carried out. Like the case of the other two co-accused —Jagiri Ram and the other man—he said that nothing was decided, and

> "all three of us were then sent out, and we were taken to Brigade Headquarters accompanied by Major Negi and Khazin Shah".

I need read the rest of it.

Then comes the next material part of the story:

> "I moved towards the Battalion with Khazin Shah and Sub-officer Barfi Singh. When I reached Battalion Headquarters, Khazin Shah told Barfi Singh to take me to Company Headquarters. In the evening an orderly took me to Battalion Headquarters. Mohd. Hussain was there. Khazin Shah and Aya Singh were also there when I arrived."

The most important point is—and which appears from the evidence of witness—that both Khazin Shah and Aya

Singh are alive, and they are the only real proper witnesses to that particular transaction. Neither of them has been produced. The story continues:

> "Khazin Shah told me, 'You will shoot Mohd. Hussain, because you are one of the men who were trying to escape with him.' I declined and said I will not shoot him....."

I have understood many psychological problems but this particular one is curious, namely, that a man who does not know how to shoot and cannot shoot, is made to shoot just as a sort of punishment, which I do not understand, and which I trust you will not be able to understand even if you set a problem to yourself.

> "Khazin Shah told me: "You will shoot Muhammad Hussain because you are one of the men who were trying to escape with him." I declined and said I will not shoot him and that I did not know how to fire a rifle. Khazin Shah told me again: "If you do not shoot Muhammad Hussain, you will be shot yourself. I still refused and he drew his pistol."

I can only express my inability to understand this particular psychology except a very foolish invention.

> "I refused again and Aya Singh got hold of a rifle. He put the rifle to my shoulder and put my finger round the trigger. Khazin Shah told Aya Singh to give the order to fire. There were three of us one Singh, one Tamil and myself. Mohd. Hussain was blindfolded by Aya Singh. He was made to sit on the ground with his back against a tree stump and his hands were tied behind his back. Aya Singh ordered me to fire and all three fired. Muhammad Hussain died there. Khazin Shah told me to report to my company and not to come to the Battalion Headquarters. That evening we marched off to Logyi. Then we stayed at Logyi two or three days. Then I went over to the British."

The cross-examination is further continued:

"After I had made the statement it was read over to me and I was asked whether it was the correct version of my statement and I said: "Yes, it was". I was again shown my statement day before yesterday and I was asked if the contents were correct and I said: "Yes." It was translated to me in Hindustani and read over to me, and I also repeated my statement once again and they both tallied. I have had no training in the use of weapons. I joined the army, I worked as a servant and a labourer. On joining hospital, I was trained in the work of bandaging patients and making their beds. I had nothing to do with the fighting part of the army. Except when the patients were sent to the hospital I had nothing to do with the men of the fighting units."

The point which I wish to make is that not one of the persons is able to identify any of them by even the remotest possible description and you cannot prove the death of "A" by saying that I saw somebody shoot someone whom I cannot identify. Continuing he said:

"Mohd. Hussain and the Garhwali I have referred to were members of the fighting units. At the time of the conversation they were not sick. I did not know them before the conversation, but they were living in the same company. I had no talk with them before, but when they came to my company I was in company headquarters. When this conversation took place I was in Popa Camp. I had never been to Burma before. Before joining the I.N.A., we were given very hard fatigues by the Japanese in connection with the loading of coal at the ports day and night.....I do not know the name of the Garhwali to whom I have referred." The test is whether the other alleged conspirators were known to him.

"I know he was a Garhwali because he lived with us and he spoke Garhwali. I had never talked either to

had never spoken to the Garhwali before that day in the Garhwali or to Muhammad Hussain before the day Mohd. Hussain joined company headquarters. I the nullah; and from that day's conversation I say that he was a Garhwali. I do not know any language or dialect beyond the dialect which I speak.

"I came to know Mohammad Hussain in company. He used to live with me at headquarters. He used to sit in my company. I know he was a Mohammadan. I do not know anything more about him. He used to speak in Punjabi with me. He used to live with me, surely I knew him. I cannot give a long description of him except his physical description. I do not know anything else about him. It was by chance that Mohd. Hussain and I got together and the Garhwali arrived in the meantime.....

"When I was arrested I said that I never intended to run away because I would have been also shot otherwise. I knew Lt. Aya Singh because he was in my company. I knew he is alive. I saw him in Jigargacha and Chittagong. The last time I saw him was in Chittagong where he arrived two or three days after my arrival there in about May last.

"I saw Capt. Shah Nawaz Khan at Divisional Headquarters. There were other orderlies and sepoys there. I do not remember having seen any officers other than Capt. Shah Nawaz Khan. I do not know the English word "crime". I know the word "report" in the words "crime report" which are written on a piece of paper now shown to me. There was no need for anybody to teach me the meaning of crime report when I was about to be produced."

I put it to him to ascertain if he understands the explanation. There cannot be any other explanation except tutoring.

"I was told that a crime report would be put up against me and that we three men would be brought before Capt. Shah Nawaz Khan. No announcement was made before me in respect of anybody except Mohd. Hussain being ordered to be shot. Capt. Shah Nawaz Khan did not say anything about myself and Alla Ditta. Alla Ditta was not present with us when we conferred in the nullah.....

"Mohd. Hussain admitted that he had intended to run away; that he wanted to run away because he was in trouble; and asked to be forgiven and said that he was prepared to go anywhere that he was ordered to. After that Capt. Shah Nawaz Khan said that he (Mohd. Hussain) was not for his country; that he was an enemy, and that he would give him death by shooting. We were then marched out. I am quite clear that nothing else happened.

"I was given a rifle at the time of the shooting of Mohd. Hussain. I do not know any weapons other than a rifle. The rifle was put on my shoulder in the aiming position by Aya Singh. I do not know the names of the Tamil and the Sikh who were present at the shooting of Mohd. Hussain but they were both present on the scene when I arrived. I do not know anything else about them or what they did. I do not know their names but I have seen them in Battalion Headquarters. I cannot say anything more about them than what I have said. I was not myself then. The rifle was put into position and I was told to hold it. I held it with the help of Aya Singh. The rifle was pointing to Mohd. Hussain. He was sitting on the ground about 5 yards away. I pressed the trigger when one-two-three was said. Three shots were fired but I do not know which shot shot him down. I did not go to Mohd. Hussain's body to see how many shots had penetrated it. I did not go near Mohd. Hussain's body after the firing. The last time I saw it it was lying there."

This is the account given by Jagiri Ram and the most important points are these: First, that he did not know his fellow shooters and he cannot identify them. Secondly, he admits that Khajin Shah and Aya Singh are both alive The third thing that he says is that I do not know Mohammad Hussain and there is no intelligible ground given why a man who did not know how to shoot was made to go through this process and it is for the Court to give some explanation. I can only submit that I can find none, and under these circumstances, I ask you to say that this witness's evidence is evidence which falls short of proof of the death of a particular individual otherwise not described, and in the absence of two persons who have not been produced before this Court.

Then, Sir, there is one more witness on this point, and that is witness L/Naik Sardar Mohammad. I will read the evidence which relates to this matter.

> "I knew Mohammad Hussain. On the 27th March Lt. Khajin Shah sent for the runners. On arrival of the runners he ordered them to bring the following men to the Battalion Headquarters; Sepoy Mohammad Hussain. Lance Naik Alla Ditta, Lance Naik Mohammad Shafi, Sepoy Jagiri Ram and Sepoy Gobbru Singh..... Khajin Shah told me that these men intended to run away. He further told me that he was going to Brigade Headquarters that evening to talk about these men, and he went away.....I met Lt. Khajin Shah on the way and I handed over these men to his charge. He let off Lance-Naik Mohammad Shafi on the spot, because his platoon commander had recommended him, and I came back. He said that Mohammad Hussain had been sentenced to be shot."

I submit with due respect that it is not good evidence.

> "to be shot. Nothing was said about others, but Jagiri Ram was with him at the time. He asked me to go to Ghulam Mohammad, the Brigade Adjutant and ask him

whether Mohammad Hussain was to be shot under Battalion arrangements or Brigade arrangements,.... I was also asked to bring Sepoy Mohammad Ibrahim who had been released from the quarter guard. I received instructions that Mohd. Hussain was to be shot under Battalion arrangements and on the same day. I brought him back, with me to Battalion Headquarters. ..... I conveyed these orders to Lt. Khajin Shah. Lt. Khajin Shah then ordered me to arrange for the execution of Mohammad Hussain ..... He asked me to detail 10 men with pick-axe and shovels. I detailed those men to dig a grave. I know that a grave was dug. I was then ordered by Lt. Khajin Shah to take Mohammad Hussain to the edge of a nullah. Mohammad Hussain was taken to the edge of the nullah. Lt. Khajin Shah, 2nd Lt. Aya Singh and Havildar-Major Govind Singh, some sepoys and myself went with Mohammad Hussain to the nullah. Lt. Khajin Shah ordered Mohammad Hussain to be tied to a tree and also ordered that he should be blindfolded. I passed on the orders to Sub-Officer Govind Singh who carried them out with the help of two other sepoys. After this Lt. Khajin Shah called two men out of the fatigue party to shoot Mohammad Hussain. They were both sepoys, one was a Tamil and the other was a Sikh. After the arrival of these men, Khajin Shah ordered that Jagiri Ram would also fire on Mohammad Hussain. The three men stood in a line facing Mohammad Hussain and Khajin Shah told Aya Singh to give the order to fire. Aya Singh hesitated. Khajin Shah once again told him to give the order to fire. Aya Singh gave the order, "Kneeling Fire". All the three sepoys fired a round each on Mohammad Hussain. Mohammad Hussain was killed. His body rolled over sideways. Khajin Shah then ordered me to send Abdul Hakim to arrange for his burial. . . .. No casualty report was sent. The sending of a casualty report was part of my duties. I did not make a casualty report

because night had fallen and we had to march the same night. On the 3rd April I escaped and reported to the Allied forces.....

"The night that Mohammad Hussain was shot we moved to Logyi. That was on the 29th March, 1945."

That question was put with a view to find out the connection between that day and the day of escape.

".....I did not have the time to prepare a casualty report of Muhammad Hussain's death. On the 1st April 1945 I did not take a casualty report to Capt. Sahgal. I do know if any was sent. I knew Jagiri Ram from the day he was arrested and taken to Brigade H. Q. I had been posted to the regiment only three or four days previously, and that is why I did not know Jagiri Ram. I knew that he was a non-combatant nursing orderly. Aya Singh was helping Jagiri Ram to fire the rifle. He was standing near him. Jagiri Ram fired with help. Lt. Khajin Shah ordered that Jagiri Ram will also be one of the firing squad. I could not see very well but the firing squad had been ordered to adopt the kneeling position and they did kneel a bit. I do not remember whether Jagiri Ram was standing or in the kneeling position. I was between 12 and 15 yards away when Mohd. Hussain fell. I went away after giving order to Abdul Hakim. I went near Mohd. Hussain and found that he was dead. He had three shots in him. The shirt covering his left breast was torn and from the amount of tear I considered there were three shots. I was not present at his burial.

(Question by the Judge-Advocate):

"When I found that three shots had gone into him and that he was lying on a side I inferred that he was dead. The firing was about 8 to 10 yards away from Mohd. Hussain. The shooting of Mohd. Hussain occurred at about dusk. I did not see any blood on Mohd. Hussain."

This is the whole of the evidence that you have before the Court and with the absence of Khajin Shah and Aya Singh, with the inexplicable alleged joining of Jagiri Ram, with the complete unidentification of the other two persons who joined in the shooting, with the most extraordinary story of three shots having gone into the body of this man in one and the same place and not a single drop of blood was found, I submit to the Court that the evidence falls short of any proof of the execution of this sentence.

Though it is a small point Jagiri Ram himself said that he fired the rifle standing and I have a vivid recollection that later on, when he was asked to say where his muzzle was pointing he was completely at sixes and sevens to answer the question or to explain the position, or to answer where and how he held the rifle and where he aimed and how he shot. That is the position in so far as the record is concerned.

Then to the evidence relating to the alleged shooting of the four persons. The first and the most important point in reference to that shooting is the exhibit 3V which I have read to the Court. If you had such clear evidence it is obvious that the other evidence must be rejected. You have the evidence about the condition in which Lt. Dhillon then was. The submission I am making to the Court is that this event did not take place because the whole of the story hinges around order after order being given by Lt. Dhillon. I am able to show as I submit I am able to show, that document was written at a time when there was not the remotest occasion of making up any document whatsoever as to the condition of his health. But the fact remains that the previous night he had gone out on reconnoitring and he came back, and I ask you to pay attention, in a condition so weak that he had never felt like that in his life before. He was actually given an injection by the doctor, that 11 more had to be given, and it was difficult to find any more medicine. For that reason alone, if there were no other reason, the picturesque ac-

count given by the two witnesses, whose evidence I am going to read as to the company being called out and Lt. Dhillon standing and giving orders and calling each man, is a story entirely untrue. More than that, the story of the location of it all seems to be completely upsetting.

As to one of the two witnesses a comment is necessary. He had no intelligible reason to be there; and he had medicines to give as I shall presently point out. He also happens to be one of the members of the nursing staff and he said he had no reason to remain there. But the still more important thing is that the second person says—his evidence shows—that the first witness was not there. What do you make of that?

Counsel for the Prosecution: He does not say that he was not there. He only says, "I did not see any other man."

Sri Desai: I say that the true inference is that he was not there, because he said he saw nobody, no stranger. The evidence suffers from such grievous infirmities, first, the practical improbability of the person who gave orders for shooting being there. Of course one can disregard anything; but after all you are to judge by human standards and not by possibilities. In fact I do go as far as this: supposing a charge of this kind had been brought—apart from a trial of this kind—and evidence had been given as to the improbability of the person who is alleged to have given orders for shooting being there, no jury would ever venture to convict him. You may say: "Oh yes the man was ill but we still believe he went there." Of course you are entitled to do so; you are judges; I do not deny that. But I ask you to be judges on material before you; and the material before you is such that as judges of fact it is impossible at all events, as I respectfully put it then and put it now—if you had a reasonable doubt that Lt. Dhillon could not have been there that day, I submit there is an end of the case. Any other picturesque description is immaterial. What is material is that the man who is alleg-

ed to have given orders for the shooting was not there; and whether he was there or not depends on the state of his health, as to which there is a contemporaneous report; and I submit to the Court that it would be highly dangerous to accept, in the state of that man's health, the story of these two men. As to both of them I will be able to point out inherently from their own evidence that they are not witnesses of truth; and that you prefer that evidence and act on your own peril. I submit, that is the real issue before the Court. I will read the evidence of the other two persons who said they were there.

There is another point which also comes out. There is no identification of the persons alleged to have been shot with the persons mentioned in the crime report. I do submit to the Court that if you find a crime report and on the strength of that document it is quite easy to have two willing witnesses of this kind—people who, I submit on their own confession (and I can show it by examination of their evidence) ought not to be believed. I say the strongest piece of evidence in my client's favour is the evidence of his state of health that day and you cannot disregard it. You can say: "Oh, no; never mind how his health was; we still believe he was there." But I submit that that is a process of reasoning which is not, what I may call, founded on justice or will be accepted by this Court. I will read the evidence of the first witness on this point:

> "One day I was carrying a patient and saw four men near a nullah whose hands were tied behind their backs and who were escorted by two sentries. When I was coming back after leaving the patient in hospital, I noticed some men assembled near the nullah. Seeing this assembly of men, I went up there. When I reached there, one company was fallen in, and a trench had been dug there. The four men were made to sit in the trench. Then Major Dhillon asked for volunteers to shoot these men. Two men from that com-

pany and one man from Brigade H. Q. came up. Their names were Naik Sher Singh, Kalu Ram and Hidayatullah. Two carried rifles and one a pistol: Sher Singh had the pistol. Then Major Dhillon called out the name of the four men in the trench. Major Dhillon told the company present that these four men had gone over to the enemy and had been caught, and therefore their punishment would be death. Then Major Dhillon ordered Hidayatullah to shoot the prisoner who had been called out of the trench first. By this time this prisoner had come out of the trench. He was standing on the edge of the trench. This prisoner was then shot by Hidayatullah and he fell down. The prisoner was not blind-folded. He was about 20 yards from Hidayatullah when fired upon."

Then there is the description about the other three men in the same way. Then he says:

"I did not see them moving after Sher Singh had fired. Then I saw Captain Lee, the Medical Officer of the Battalion examine them. Captain Lee said something to Major Dhillon."

Captain Lee is another witness who should have been called to prove this:

"Afterwards Major Dhillon ordered the dead bodies to be buried. I did not see them being buried.....I went over to the Gurkha Regiment a fortnight after these men were shot. These four men who were shot were Jats. I know nothing else about them."

It is most extraordinary. You have A. B. C. and D. condemned to death, and you are asked to believe the one man who did not know who they were. In a trial for murder, if you are told that A was ordered to be shot and some one says: "I saw somebody shot and therefore I come to the conclusion that A was shot," I think one would be shocked to hear such a thing. I submit we have our points quite clear in cross-examination. This witness said:

"I have never seen these men before. I did not know where they had come from."

It is not the charge at all that any four men were shot for any other crime or for no reason whatever. You are not called upon to say whether some other men were shot or why they were shot. That is not the charge.

Having dealt with the first part, which I do not want to repeat again, you will see how many infirmities are there. First, the improbability of Lt. Dhillon being there, according to the description in the sick report; next, no identification of any of the four men, never having been seen by these two men before. I do not say merely the cumulative effect of the whole thing—but even if any one of them was wanting you cannot say it is proved.

Then I have tried to prove from this evidence as far as it is possible to do so, as to whether or not he was required to go back to his duties, and he ultimately had to admit that he could not be there in the proper discharge of his duties; and after all the way in which you will judge a man is not by merely saying what they did, but by the probabilities of circumstances. If a man is expected to be on duty, and he says he stayed away out of sheer curiosity, would you rather prefer to believe that he went to his duty and was not there, or are you prepared to say, just because he said so, that he was there? He says further:

"I stopped there for about half an hour". It is rather important from the point of view which I submit is of a man in that condition, which as I said, is a fact which you cannot possibly disregard. In that condition, according to him, this process took half an hour. Then he says:

"I had nothing to do with either the men who were present there or the incident which took place there. I cannot tell the date or the week or the month on which this incident happened. I went over to the

Gurkha Regiment which was in a nearby village, the name of which I do not know. The incident to which I referred happened in 1945. I did not mention this incident at all in the Gurkha Regiment. I did not talk to anybody out of the assembly in the nullah. The company assembled in the nullah was about 100 strong."

The next witness will tell you there were about 25 men there—

"I did not see any outsider apart from the officers, the company and myself."

If in the teeth of that, the Advocate-General still insists that my interpretation of the evidence of the other man that he was no stranger is not correct, I ask the Court not to accept such an argument, because he may be plain and tell us who were there. I cross-examined the other witness and asked him whether besides the officers and the company there was any stranger, and he said 'No'; and if after that I am to be told that I have not proved from the mouth of the other witness that the first witness was not there, it is an untrue interpretation of the evidence. He further says:

"I knew the names of Hidayatullah, Sepoy Kalu Ram and Naik Sher Singh because they belonged to my Battalion. My duty was to render first-aid. I never preferred first-aid to the three men I have mentioned. While at Popa, the Battalion consisted of 200 to 250 men. The three men do not come from the same place in India as I do. I do not know where they come from. I had no personal contact with these three men before that date. I had nothing to do with them after the incident."

I say the probability is one in a thousand—the man knows nothing before, knows nothing afterwards; does not shoot and does not know how to shoot; has no business

to be there; and yet you are asked to believe that evidence that the shooting took place. I submit it is a story which men of reason, just as we have on this tribunal, will not accept. The evidence goes on—

> "They used to be in my Battalion and I knew them. I cannot give the nominal roll of all the men of the Battalion. I know the names of some but not of all men in the Battalion. I can give the names of 10 or 12 people in the Battalion.....I did not talk to any of these men before that date. I have never seen these three men since."—(that is with reference to the persons alleged to have been shot).

> "I was 10 to 12 yards away from Major Dhillon. Nobody asked me why I was standing there. I had nothing to do with what Major Dhillon said on that occasion. I am not a poet. I am not a writer either. I swear and say to the Court that I remember every detail of what I have told the Court. I remember very well that none of the first men nor any of the other men were blindfolded. I omitted this detail in my evidence because I was not asked. I said that three volunteered to shoot these four men. The whole company was armed. Most of them had rifles and a few of them had not. I knew at that time the name of the man whom Major Dhillon selected to shoot first. I do not know the names of any of the four men who were shot nor do I know their identity. After the shooting, Major Dhillon went away and so I went away as well. At the beginning I did not know what was happening there but when I came to know what was happening there, I stayed on to see the end. I was 12 to 13 yards away from the place where these men fell. This occurred at about 4 o'clock in the afternoon. I did not have a watch."

The next improbability is that at the time there were sudden air raids, and this process which according to the witness went on for half an hour is a matter for you to

consider. But the important points are those which I mentioned first. This witness himself says:

> "The place was subject to air attacks during those days.....Aeroplanes used to come over us frequently. There were trenches about and the nullah was a sheltered area. I do not know the persons who chose the nullah....I am shown my statement of the summary of evidence. I signed that statement and identify my signature. It was read over to me before I signed it. My attention is drawn to the passage. As far as I remember, I said that Major Dhillon had ordered Sher Singh to fire a pistol, but it was not taken down."

I mean, he is quite willing to improve on any story so long as you ask him to do so.

> "I was not interested in Captain Lee's examination or his report. I was not interested in their burial either. Darbans Singh gave orders for their burial in my presence."

Questioned by the Court he said:

> "This company in the nullah was properly fallen in. These men were in front of the company. The company was about 10 or 12 yards from these men and I stood near the company on one side. Major Dhillon gave orders for the fourth man to be shot."

Sepoy Gian Singh: "I remember four men being shot there. At about 4 o'clock one evening our company got orders to fall in in a nullah. On arrival there I saw four men whose hands were tied behind their backs. They were in a trench. Major Dhillon said that these four men had tried to go over to the British and so they were sentenced to death." Then he gives the names and details of the shooting of each man. "These four men who were killed were Jats. I do not know anything more about them." For all I care any four Jats were killed, that would be the proof. That this particular sentence was carried out would

be, I submit, the height of improbability, and unless there is definite evidence that the four particular individuals named in the crime report were shot, as having been identified as having been shot, I submit to the Court that you cannot possibly hold that these particular four persons were shot. The charge is aiding or abetting or the committing of the crime of shooting, and by proving that a Jat was shot, I submit with very great respect, nothing is proved. My case is honestly and deliberately that this is a false story. The sentence was not carried out. But taking everything against myself, and standing before a Court of law I say you do not establish a charge of shooting A by saying that you shot a Hindu. A Hindu may have been shot for all I know on the same day.

Then, Sir, we come to the cross-examination of this witness. "The nullah to which I have referred was about five feet wide." Imagine the picture as this man gives and of course it cannot possibly agree with the other picture. The other picture was one hundred people were present. This man's picture is that "from where I stood to where the trench was, it was about 25 feet, 20 feet deep and five feet wide." Few would believe that the company had fallen in in such a place for such a purpose. I cannot imagine that a company would be asked to fall into a kind of well as this gentleman has described. Then he says that the height of the room was about 20 feet.

> "There were about 30 men in this space. Such men of the company as were in the lines were present there. Some men had gone out on fatigue. The trench was dug at one end of the nullah. I do not remember how many officers were there. Capt. Dhillon was in front of the company. The trench was below the nullah bed. I did not see the depth of the trench. The trench was between 20 and 25 yards from where the company had fallen in. A person in the trench could hear what was said from the place where the company was, if it was spoken loud enough to be heard."

In that narrow space it is impossible to suppose that the other gentleman if he was there could ever have escaped detection. The man says that the whole process took half an hour, and hence the value of the submission that I make. "I do not remember any person not belonging to the company being there." I say that it requires a lot of conviction to submit to a court of law that this does not prove what I say it proves, namely that the first witness is proved by the second witness not to have been there. After all he said that there were thirty people. He knew that they were members of his company. Others had gone out on fatigue duty. This man says definitely: "I do not remember any person not belonging to the company being there." I submit with great respect that it has only one and one result, and that is that at all events the second witness says that the first witness was not there at all. Remember that within that five feet space you could not escape noticing any man. You could not help it if he was there.

"We were standing in a place like this room except that it was not so broad. At some places it was wider but the place where we were standing in the nullah was about 5 feet broad. Of these three men who volunteered to do the shooting, two belonged to the company and one to Brigade Headquarters Police. Those three men who did the shooting were fallen in with the rest of the company when they volunteered to shoot. Because of air raids men used to go and hide themselves in the nullah bed and Naik Sher Singh was hiding in the nullah at the time. At that time there were constant apprehensions of air raids. The trench was about 20 yards away from where I was standing. The trench was at right angles to the bed of the nullah. I did not notice at the time what the length of the trench was. I did not notice whether the nullah was any wider at the point where the trench was. We were standing in two lines in the nullah facing the end of the nullah and I was in the middle of the company. All the men were facing towards where the men were shot. The men were in two groups. Major

Dhillon was standing in front of the two groups, about 2 paces away from me. I heard Major Dhillon order the four men out one by one. I do not know their names. I had been in the company for a long time and that is how I knew the names of Kalu Ram and Hidayatullah."

I submit that this again falls completely short of the proof of anything whatever like the death of an individual with whose death a man is accused. Remember that you have got to be satisfied, not in a vague sort of way, that some people were ordered to be shot, that some people were shot and those who were shot were those who were ordered to be shot. It is a process of absolutely vicious reasoning which I hope will not be resorted to or made use of by the Prosecution. Merely because the names of four persons who you say were shot were there, you cannot prove that they were shot by saying that some people were shot.

Therefore, to summarise the evidence, it suffers from the worst infirmities, and much more so in a case where a man is charged with murder. First, it is improbable that the person who is alleged to have given orders was there or could have been there. It is improbable that in that state of health he could have been there for the period of time alleged for the process. Next, neither of the two witnesses is able to identify in the least degree who was shot. Then, the second witness says that the first witness was not there, and the second witness gives a picture which it is for you to believe to what extent it is correct And then in addition to that, I am going to call attention to the evidence of witness, where in many instances of that kind, people were sort of sentenced but the sentence was never carried out.

The evidence to which I am referring is the evidence of P. W. 5 and it belongs to the same period to which this particular alleged shooting refers. The evidence of P. W. 5 in cross-examination is: "I know Captain Rab Nawaz. He was the commander of one of the P. O. W.s Camps at Port

Dixon, and the other camp was commanded by Capt. Karam Chand Bias of the first Bhawalpur Infantry. Capt. Rab Nawaz did not volunteer for the I.N.A. nor did Captain Bias After Captain Sahgal's conference on the 1st of March within the next two weeks, there were several people arrested. After investigation all were released except Capt. Bedi. The reason for my remembering the date on which Capt. Sehgal commanded No.2 Division was that on 28th February 1945 five officers deserted and on that occasion Capt. Sahgal arrested Capt. Bedi, Captain Sahgal arrested Captain Bedi on the 1st or 2nd of March 1945 as a Divisional Commander. I do not remember the exact date on which Capt. Sahgal began to act as Divisional Commander."

Then, Sir, you have the evidence of Gangasaran, to which I have already called attention, and this belongs to the same period as the date of the alleged execution of this sentence. Considering the evidence on record, I would submit to the Court that there is such a lacuna of evidence of identity, of improbability, that the Court should hold that there is at least a reasonable doubt whether this particular event took place. I of course put it more affirmatively myself, but feeling as I do in a case of this kind, it is my duty to put the case at the very lowest, and I say that there is want of evidence that is sufficient for my purpose. It is not enough that A should have been ordered to be shot, that by any process of reasoning therefore he must have been shot. That is a process which I submit is wrong and not permissible. The actual execution of the sentence has got to be proved with complete identity between those against whom the sentence was passed and those whom it is alleged were shot on this occasion. The thing has got to be proved by affirmative evidence and the burden of proof is completely on the Prosecution, hundred witnesses notwithstanding. In this case there are only two. One of them says that the other was not there. The point really is not how the deficiency of evidence arises. The question really is that the burden of proof being on

the Prosecution to show that a definite person, A, B, C, or D was killed, and died as a result of the action of a person who ordered the shooting is a fact, which must be proved.

All that is proved is, taking the allegation at its face value, that four shots were fired, and the identity of the persons shot is not known. My submission to the Court on that is that the evidence on this point suffers from infirmities which I have detailed to the Court in dealing with the evidence.

Therefore with reference to this charge dealing with murder, my submission is that the Prosecution has entirely failed to prove the charges. The alternative submission is, assuming that the Court agrees with me that this was done in due course of the execution of the duty of an officer in the I.N.A. governed by its own code, there is no question of any liability.

I say that Kalu Ram and Sher Singh who are said to have fired the shots are alive, and there is not that sufficiency of evidence either on facts or identity. Therefore I ask the Court not to run away with the idea that a sentence was passed on A, B, C, and D, some people were shot on that day, and therefore the persons shot were those identical persons. This is a point which I cannot too often submit for the consideration of the Court. To say that A was shot because some persons were shot, is indeed a piece of logic which ought not to be allowed in a case of this grave magnitude. It is not permissible even in an ordinary case. The question says: Did you see A? The answer is: I do not know, but I saw somebody going into the fort and he was expected to go there. In a case of this kind, to say that he did go, would be the height of wrong reasoning. That is all I have got to say on the question of the sentence.

I submitted in the beginning of this case that this army of the I.N.A. was an organised army. The actual sections of the IN.A. Act have been cited, as the Court will see from the crime report, and the Court will see that there can be no liability for any acts done in due prose-

cution of the war in the execution by officers of their respective duties. That of course is a complete answer. I submit that even if the case is laid against A as a private individual, even then the evidence on the subject of having caused death, falls short.

Then there is a small point. I come to the evidence of Col. Kitson and Ghulam Muhammad with reference to the circumstances of Captain Sahgal's surrender. It is a point of substance, because under the terms of the surrender which were offered and accepted, the accused are entitled to all the privileges of prisoners of war on the cessation of hostilities. I shall now read the evidence of Col. Kitson, P. W. 29. He says:

"I then went forward myself up to the east corner of this village, when I met my leading Company Commander together with Captain Sahgal the accused. With him were a number of other officers of the Indian National Army and approximately a hundred Indian troops of the I.N.A. at that particular time. More appeared later. My leading Company Commander handed me a note which he had received from a surrender party under a white flag. I am afraid I have not preserved the note. I destroyed it about two months later when I was going through some papers, and I am afraid I saw no importance of this note which I threw away. The note was addressed to the Commander of the British Forces, or may have been addressed to the Allied Forces, and it said that approximately 30 officers and 500 troops of the I.N.A. wish to surrender as prisoners of war. I then talked to Captain Sahgal, and he gave me his name and his regiment. He said 'I am Captain Sahgal, and I asked him what his unit was both in the I.N.A. and in the Indian Army, and he told me then that he had been in the 5/10th Baluch and that he was then commanding a regiment of the I.N.A. and that he had with him there at his Regimental Headquarters a 1st Aid attachment and one Battalion of his Regiment. I then made ar-

rangements for the collecting of all the arms of the prisoners and arranged with Captain Sahgal about their feeding. We had no food for them."

You have to read this evidence in the light of what Ghulam Muhammad said. He has given evidence before you to this effect that all non-commissioned officers collected together, they were given an hour's time to consider the question of surrender as prisoners of war, and that if that was not accepted they were prepared to fight. A letter to that effect was written and despatched, and you have the evidence of Col. Kitson as to what happened. Under these circumstances I submit that in so far as the surrender of Captain Sahgal is concerned, it has been on the terms on which the offer was made, and I submit he is entitled to be released.

There are one or two small matters which I should like to deal with before I raise three points of law. You must have heard the evidence of the last defence witness, Captain Arshad. He gives you a truthful account of what occurred prior to the surrender of Rangoon, and the reoccupation of Rangoon. I have produced four documents which clearly show the recognition on the part of the British officers of the existence of an organised army called the I.N.A. The men in charge have been addressed by their proper designation and they have been entrusted with definite duties, and there is ample evidence to prove that the I.N.A. was an organised army, and it was treated as an organised army. I would draw your attention to exhibits 5 Us. 5 Vs. and 5 Ws. You will find instructions there regarding the address of officers. This includes a document by Brigadier Lauder.

So, I submit that right up to the time of the surrender there has been recognition on the part of the opposing armies, that the I.N.A. was an organised army and it was so referred to and addressed through its proper officers. They were also recognised as officers for the time being. That, Sir, is practically the whole of the case regarding the documents and the recorded evidence.

I now come to certain submissions regarding further points of law. They are three in number and they are founded on a true interpretation of the Indian Army Act and of the rules thereunder. Under Section 41, this Court is authorised and is given jurisdiction to try among others civil offences.

The word 'civil offence' is defined in the Act itself. Section 7, Sub-Section (18) reads; "A civil offence means an offence which, if committed in British India, would be triable by a Criminal Court." The question really depends on the true construction of the words "triable by a criminal court." I know and I am fully aware that the Criminal Procedure Code has not been applied to the proceedings of this Court. But that is irrelevant to the issue that I am now going to submit to the Court. If, by the definition under Sub-Section (18) you have to find out what is triable by a Criminal Court, you cannot just do it in the air. I defy my honourable friend, or anybody else, to say what it is unless you go to the appropriate Act which shows what things are triable by a Criminal Court. That is not saying that the Criminal Procedure Code is applied here. That is where there is a likelihood of false reasoning. The point is this. In order to understand one statute, and where the statute expressly refers to what is triable by a Criminal Court, you must go to the statute which defines what is triable by a Criminal Court. It would be an extraordinary thing if the whole thing were left in the air. Therefore, if there is another statute which shows what is triable by a Criminal Court, you have got to go to it, notwithstanding that the statute is not applicable to the proceedings of this Court. What I do say is this. If you have to find out what is triable by a Criminal Court, you must go to the statute which shows what is triable by a Criminal Court, and that statute, so far as one is aware, is the Criminal Procedure Code. On that two points arise. One is that under Section 196 of the Criminal Procedure Code it is laid down as follows:

"No court (meaning no criminal court) shall take cognizance of any offence punishable under Chapter VI (which is this offence) unless upon the complaint made by the order or under the authority of the Provincial Government or some officer empowered by the Provincial Government in this behalf." If merely for the purpose of finding out what is it that is given to you for trial you have to go to another statute, then it is a wrong argument to say that you will not. Let me put it in plainer language. When you say that my terms of engagement are the same as those of Major Preetam Singh's, it is not enough. I must ascertain my terms from the contract. That is the simple illustration which will bring home to even a layman's mind the point that I am intending to make. The point that I am making is this that the civil offences which are committed to you for trial are those which will be triable by a criminal court. Therefore, my first submission is that what offences are triable by a criminal court you can only discover by looking at another law which is appropriate to the purpose and not by shutting your eyes to it. When you go and look into that law, what do you find? That law requires that that offence would not be triable by that criminal court except upon the complaint of an officer of the Local Government, etc. It has nothing to do with Captain Mead's case or any other case. That was a case of Section 270 of the Government of India Act and has got no bearing on the question. The point is this. How do you discover or where do you discover that the offence is triable by a criminal court. That you must discover because you cannot say that anything that is brought to you for trial, you will try. You will yourself ask: "What is it that I am entitled to try and if I am only entitled to try that which is triable by a criminal court, I must necessarily go to the statute which gives me that power." My submission to the Court is that by reason of Section 196, no complaint having been made by a Local Government or an officer in that behalf appointed by them, this Court may not try an offence under section 121, Chapter VI.

My next point is again a point of construction, a point which, I submit, is of commonsense. If I am given a power to try offences within a certain limit, then I must find out what is being triable by a criminal court. If I find that a criminal court is incapable of trying an offence, then you must come to the conclusion that a criminal court of its own motion and of its own authority is incapable of trying that offence. If a criminal court is incapable without more of trying the offence, equally this Court is incapable of trying the offence. In other words, there are two alternative arguments before the Court. One is that within this sphere of the offences triable by this court, this particular offence does not fall, in that it is not triable by a criminal court without more. In other words, a criminal court of its own motion could not possibly take cognizance of this charge. Until the Local Government by itself or through its proper officer, does not move, the criminal court is incapable of trying it. Therefore, the question is two-fold. Firstly, that the criminal court being incapable of trying, this Court is also incapable of trying it. Secondly, if you put the point that the criminal court is capable of trying, but with a condition satisfied. Therefore in either view of the case, this Court is not competent to try the charges before it. My submission is that, in so far as the charges of alleged murder by Shah Nawaz or Dhillon are concerned, they are really part of it and nothing else. It is not suggested on the record that either of them wanted to shoot anybody for personal enmity or for any other cause of any other kind. It is patent on the face of the record that they were part of the actions which they took as officers of the I.N.A. Therefore, my submission is that the Court is not competent to try the two sets of offences before it. Per contra if the Court is of opinion or should it come to be of opinion that the charges of murder or abetment of murder are independent charges, then my submission to the Court is that under Rule 24 of the rules of conduct of trial in this court, the joint trial is completely illegal on a decision

of the Privy Council in Indian Law Reports, 25 Madras, Subramaniam's case. (Rule 24 was read out and the Judge Advocate pointed out the amendment to it). -That does not fall within the Rule because as to the murder and abetment of Muhammed Hussain all the persons are not there. So that whether you call up this rule or any other rule, there is what you may call in the plain language of the section, a complete misjoinder of the charges and of the accused. Shah Nawaz has nothing to do with the alleged murder nor has Dhillon anything to do with the murder of Muhammad Hussain. I submit to the Court confidently that if you treat the second set of charges as independent charges, this trial is wholly illegal.

I will now give to the Court the judgment of the Privy Council in Law Reports, 25 Madras, on page 61.

> "The appellant was tried at the Criminal Sessions of the High Court, and convicted on an indictment the first count of which contravened the provisions of Sections 233 and 234 of the Code of Criminal Procedure (which proved that every separate offence shall be charged and tried separately, except that three offences of the same kind may be tried together in one charge if committed within the period of one year), and did not fall within the provisions of section 235 (1) which provides that if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence. On a case certified under article 26 of the Letters Patent and heard by the Full Court, it was held by the majority of the Court that the union of the first count with the others made the whole indictment bad for misjoinder, but that it was open to them to strike out the first count, rejecting the evidence with regard to it, and deal with the evidence as to the remaining counts of the indictment. This was done with the result that the

conviction was upheld on one count only, the sentence being reduced:

Held, by the Judicial Committee that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by Section 537 of the Criminal Procedure Code. Such a phrase as 'irregularity' is not appropriate to the illegality of trying an accused person for more different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment.

"Nor could such illegal procedure be amended by arranging afterwards what might or might not have been properly submitted to the jury. To allow this would leave to the Court the functions of the jury, and the accused would never have been really tried at all upon the charge afterwards arranged by the Court. The trial having been conducted in a manner prohibited by law, was held to be altogether illegal and the conviction was set aside."

The judgment of the Lord Chancellor is on p. 96.

"In this case the appellant was tried on an indictment in which he was charged with no less than forty-one acts, these acts extending over a period of two years. This was plainly in contravention of the Code of Criminal Procedure, Section 234, which provides that a person may only be tried for three offences of the same kind if committed within a period of twelve months. The reason for such a provision, which is analogous to our own provisions in respect of embezzlement, is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together such a number of instances of culpability and the consequent embarrassment both to judges and accused. It is likely to cause confusion and to interfere with the definite proof of

a distinct offence which it is the object of all criminal procedure to obtain. The policy of such a provision is manifest and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of Criminal Procedure. Their Lordships think that the course pursued and which was plainly illegal cannot be amended by arranging afterwards what might or might not have been properly submitted to the jury."

It means that it is too late for even this Court to say, "We will either strike out the charge of waging war or strike out the charges of murder and abetment of murder in which some of the persons are uninterested and not charged with reference to offences charged against others."

Then the judgment proceeds—

"Upon the assumption that the trial was illegally conducted it is idle to suggest"—I am glad I am not using those words but the Lord Chancellor uses them—"that there is enough left upon the indictment upon which a conviction might have been supported if the accused had been properly tried. The mischief sought to be avoided by the Statute has been done. The effect of the multitude of charges before the jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the written accusation as ought to have been submitted to the jury.

"It would in the first place leave to the Court the functions of the jury and the accused would never have really been tried at all upon the charge arranged afterwards by the Court.

Their Lordships cannot regard this as cured by Section 537."

They do not say that any irregularity has not caused injustice and so does not matter. But even that does not exist, because he must be held to the consequence in both ways. My learned friend says that the Criminal Procedure Code does not apply, and as such we proceed. So he cannot have resort to Section 537. And then you get back to a very narrow point that the trial, as I submit, is clearly in contravention of Rule 24 of the Rules of Procedure. It is a complete irregularity and there is no way of curing it. Their Lordships proceed:—

> "Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity."

In other words, you cannot in one trial charge people collectively unless they have committed all the offences collectively, which admittedly they have not done. Even on the extended words which the Judge-Advocate read they would not apply because one thing is quite clear in relation to the charges, and that is this, that some of the accused are not in any manner liable for the offences alleged to have been committed by others. Therefore I submit that this trial is wholly illegal. The judgment proceeds:—

> "Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment. The illustration of the section itself sufficiently shows what was meant."

The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the Criminal Law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission or irregularity.

"Some pertinent observations are made upon the subject by Lord Herschell and Lord Russell of Killowen in Smurthwaite vs. Hannay, where in a civil case several causes of action were joined Lord Herschell says that 'If unwarranted by any enactment or rule it is much more than an irregularity', and Lord Russell of Killowen in the same case says, 'Such a joinder of plaintiffs is more than an irregularity; it is the constitution of a suit in a way not authorised by law and the rules applicable to procedure."

"With all respects to Sir Francis Maclean and the other Judges who agreed with him in the case of In the Matter of Abdur Rahman, he appears to have fallen into a very manifest logical error in arguing that because all irregularities are illegal, that therefore all things that may in his view be called illegal are therefore by that one adjective applied to them become equal in importance and are susceptible of being treated alike. But the trial was prohibited in the mode in which it was conducted, and their Lordships will humbly advise His Majesty that the conviction should be set aside."

And I submit it does not require much argument. It is therefore wrong on the face of the charges with which these men are charged, and I submit that this trial is wholly illegal and I ask you to hold it so.

That is as far as I will go on the record on the points which arise for your decision, and there are very few points indeed. I will plainly and briefly state to the Court the points on which I rely, so that there may be no room for mistake or equivocation about it. I say that this is a case of men not acting on their own in any struggle or waging war at all. This is a case of men as part of a regular organised army, accepted as such by their opponents, fighting a war under the directions of a regularly formed Government. That being so, I submit that they are subject to the ordinary laws of war with which I have troubled you

at some length, namely, they are entitled to all the rights and immunities of belligerents. My submission is that to the extent to which this is a matter pertaining to war and the conduct of war it is outside the municipal law. But I am afraid sometimes in the narrow precincts of a Court like this, one may say: "What have I got to do with international law?" But fortunately for myself I am fortified in this case so that I can fall within the four corners of the Indian enactment, i.e., Sec. 79. I say that if my first submission as to the jurisdiction of municipal law and its non-application is not upheld by this Court—though I submit it should be—I say that within the meaning of Sec. 79 it is quite plain—you are bound to give effect to it and I have submitted authorities—that the word "law" as administered in Britain and India recognises the principles of international law. And therefore, if a thing is justified by law, I can plead justification before this Court under Sec. 79. That is my first point.

My second point before the Court is that as regards questions which were incidental, I do not wish to repeat them here, though I wish to submit to the Court that the question of allegiance is irrelevant to the issue, but to the extent to which it is relevant I have already submitted that when the time arrives in relations between the Crown and the Colonies, the Colonies are entitled to throw off their allegiance on the outbreak of war for the purpose of their liberation. And I have given you the most classical instance of those who are now the friends of Britain and, if I may say so, their warmest and greatest supporters in the task of saving civilisation. You could not have a stronger instance than that.

Then the next point which I ask the Court to hold is that on a question of fact entirely, in so far as the Indian National Army was concerned, it was a voluntary organisation. Even if there were conscription, it does not make any difference in this case, because there are countries where there is conscription and punishment attached to it even today. But it has become fashionable to say. "Oh,

there was torture and coercion" and all the rest of it, and I ask the Court to hold that it was entirely free from any such complaint. At all events, apart from any hearsay, on the evidence recorded before this Court, I have already submitted that the people who complain of torture fall into four classes: there were those who prove that in two cases it was for reasons which are self-confessed in one case and practically admitted in the second case. The first was refusing to do fatigue and the second case was cow-killing. As to the other cases of an isolated character, they are exaggerated, and deserve nothing else but contempt at your hands. If men were asked to do fatigue duty, merely because they have to carry baskets or make beds for the purpose of sowing vegetables, if they say it was torture, I hope my learned friend will not use that word in connection with that conduct.

Then I ask the Court to hold that in any event this evidence is totally irrelevant for the purpose of this case, for the reasons which I have submitted, namely, that the ground on which that evidence was attempted is entirely proved not to exist.

The next thing that I submit to the Court is that the evidence with reference to the alleged charges of murder would be really covered, if I am right in my first submission, by the fact that they are part of the prosecution of the war, in that these people were sentenced by Court Martial to be shot under the proper law. The next thing I ask the Court to hold is that there was an organised Government, that a very large number of Indians in the Far East owned allegiance to this Government, which was recognised, having had ceded to it territories which are mentioned, and it was by this Government that war was declared, and the Indian National Army fought this campaign.

I will hand over to the learned Judge-Advocate the list which I offered to give him yesterday on the point which my learned friend on the other side attempts to

make, in that as if there was some provision as to flogging, intending possibly thereby to argue that the whole of that Code was an uncivilised Code. I think he was snatching at a complete straw, because as to the rest of the Act, he admitted that it was in consonance with the Indian Army Act. And the only thing that he referred to is corporal punishment. I am therefore handing to the Judge-Advocate provisions of the law in which the same thing appears under a different head, in force when the Indian Army Act was in operation.

Judge-Advocate: Are you referring to Sec. 22 of the Indian Army Act?

Sri. Desai: My learned friend tried to make out as if whipping was a punishment which was abolished with reference to the army in this country, and I submit that he was entirely mistaken.

Judge-Advocate: The very first sentence in writing that you have given is wrong. You have got flogging under the Act as it stands. Punishment of whipping can be inflicted on menial servants up to a maximum of 20 strokes—that is what is written here, and the correct thing is 12 strokes on active service.

Sri Desai: If I am wrong, I must correct myself.

Judge-Advocate: I have corrected it now.

Sri Desai: The point, Sirs, which I am trying to labour before the Court is this: In addition to the provisions in the Indian Army Act, there are provisions under the Defence of India Act and in the Ordinances. All of them have got to be taken together to see whether or not, and what punishment is permissible.

By Ordinance 3 of 1942—if necessary we will produce the actual copy of the Ordinance before you—whipping was ordered as a punishment.

Let me get back to the point: The point really is that in so far as the governance of the Army is concerned, it was governed by an Act which, except for the purpose of whipping, has been practically or tacitly admitted to be the Indian Army Act. As regards whipping, I submit to the Court that that kind of punishment exists, though not in the Army Act wholly, in the three Ordinances which are reproduced. Supposing to the extent to which there was an excess of the number of strokes, I submit with very great respect that it is not going to make an uncivilised Army because of that. Therefore, substantially the point is, there is an army governed by a Code which is substantially, if not actually, word for word, the same as the Indian Army Act.

I next come to the question that, in fact, the alleged atrocities—that is the mildest word that can be used from the point of view of my learned friend—which are said to have been exercised for the purpose of getting enrolment to the I.N.A. are in fact not true. The accused are not charged with it, nor have they anything to do with it. They neither did it, nor permitted it, nor encouraged it, nor have they any knowledge of it. That, Sir, is the actual position so far as that charge is concerned.

Then, coming to the alleged charge of murder and abetment, I have dealt with that and I have satisfied the Court that the execution of the sentences has not been proved.

My next submission to the Court is that this trial is wholly illegal.

My next submission to the Court is that so far as the construction of the words 'offences triable by a Criminal Court' is concerned, the Court must have reference to the only enactment which says what are the offences triable by the Court, and you cannot do by saying that the Criminal Procedure Code is not applicable,—and if it has to be resorted to, then it has to be stated: First, this charge

is not triable at all. Alternatively, in any case, this charge is not triable except on the complaint of a Local Government or an officer authorized in that behalf, and such a complaint does not exist. And for this reason my clients should be declared innocent of the charges against them.

The last thing that I wish to say is that if any new or fresh authority is cited by my learned friend which I had no opportunity of meeting, I should be permitted to hand in a very short statement, covering a single page, as to why those authorities if they are relied upon are not applicable to the facts of this case or to the decision in this case.

Finally, Sirs, I acknowledge with appreciation the courtesy and attention that has been given to us, and I hope that when I hand over a signed transcript to each member of the Court, it will receive such attention as it may deserve.

Judge-Advocate: With regard to your last submission, under what rule are you applying to make another address?

Sri Desai: I do not pretend that there is a rule. It is a matter of common justice. If any authority is cited by one side which the other side has never had any opportunity of seeing or meeting, with the best of imagination he could not possibly deal with it. Therefore, common fairness demands that he should be given a chance to explain. All that is forbidden is an address to the Court. But surely for your own assistance, if we may pretend that we are able to give any assistance, if anything is cited by the other side which is not seen by me, surely I should be allowed to present to the Court a very short resume of my grounds on which it is not applicable.

Judge-Advocate: Would that not apply to any case in which your opponent had the last word?

Sri Desai: Then the law is accepted. My learned friend will not contradict it. Even when a man has no right to reply and a fresh authority is cited, he has a right

to answer. I hope my learned friend will agree with me there. It is a rule of common fairness. You do not need a rule for this: that a thing which is never urged before this Court, is urged before this Court, and no reply is allowed.

Judge-Advocate: As I have often told you, gentlemen, a Court Martial is bound by very rigid rules outside which they cannot go. The rule is laid down for your strict obedience by the Indian Legislature, and whether rightly or wrongly you cannot go outside that rule. Rule 48 of the Indian Army Act is the only rule I know with regard to the right of address, and it reads as follows:

(Reads Rule 48 of the Indian Army Act).

That rigid rule is for your strict compliance.

Sri Desai: There is one point I would like to urge. The words are: "The Prosecutor may reply". If the Prosecutor confines himself to merely replying to what I have said, I have nothing to say. Let him be confined completely to what I have argued by way of reply, and I am quite content. I am glad that though the ruling is partly against me, it is partly in my favour also. Let that ruling be strictly followed, namely that it will be enjoined on the Prosecutor that he does nothing more than reply to what I have argued. Then I am quite content.

Judge-Advocate: The Court regret they are unable to permit a further address by the Counsel for the Defence after the address of the Counsel for the Prosecution.

Sri Desai: Would the Court direct that the Prosecutor would only reply what I have argued and nothing more? You cannot have it both ways.

Counsel for the Prosecution: That is not the meaning of the word 'reply', I submit.

Sri Desai: If my friend thinks that he is supporting the cause of justice by saying that I cannot reply to a new

matter in case law, that is a new law. Unless he is prepared to submit to this restriction, I submit the law lays on him the duty merely to reply to what I have said. I have nothing more to say, justice or no justice. I hope my learned friend cites nothing that is not strictly relevant to what I have said.

Counsel for the Prosecution: My submission is that it is not replying to what you have said but it means addressing the Court on the case. I ask for an adjournment for my address and I have to ask for an adjournment up to Saturday. What I intend to do is to give my address in writing, if not the whole of it, at least the largest part of it.

President: The whole of your address on Saturday?

Counsel for the Prosecution: I think so. But I would suggest that an extra hour might be thrown in. If I have it in writing, it will not take so long.

Sri Desai: I have no objection.

Counsel for the Prosecution: To be on the safe side, an extra hour might be put in on Saturday.

President: No objection?

Counsel for the Defence: Certainly not.

Application for adjournment by Sir P. Engineer.

Note by the Court

The Counsel for the Prosecution requests an adjournment until Saturday, 22nd December 1945 for the purpose of preparing his closing address. The Court allowed this adjournment.

At 16-30 hours the Court adjourns until 10-00 hours on 22nd December 1945.

18th December, 1945.