THE APPLICATION OF THE GENEVA CONVENTIONS, 1949, IN MALAYSIA

Although Islam is the religion of the Federation,[1] the law that is applicable and followed in Malaysia (apart from certain family and religious matters affecting the Muslims) is not the Islamic Law. In the field of humanitarian law, the law is contained in legislation based on similar legislation in the United Kingdom. In the United Kingdom the earliest legislation was the Geneva Convention Act, 1911 which prohibits the use without authority of the emblem of the Red Cross on a white background. This Act was enacted as a result of the decision of the United Kingdom to withdraw from the reservation it had made to the Geneva Convention of 1906. This Imperial Act was applicable to Penang and Malacca, which were then part of the Colony of the Straits Settlements and to Sarawak and Sabah (then North Borneo). In the Federated Malay States the legislation was enacted as the Red Cross (Control of Use) Enactment, 1918, which followed the United Kingdom Act of 1911; this was included in the Revised Edition of the Laws of the Federated Malay States, 1955 as Cap. 51. Similar legislation was enacted in Johore (E. 9 of 1918), Kedah (Enactment No. 93), Perlis (Red Cross Enactment, 1336, No. 13 of 1336), Kelantan (Enactment 2 of 1918) and Trengganu (Enactment 16 of 1356).

Subsequently in 1937 was enacted in the United Kingdom the Geneva Convention Act, 1937, which prohibited the use without authority of certain expressions including the "Red Cross" and the "Geneva Cross". This Act was passed to give effect to article 28 of the Geneva Convention of 1929. This Act also applied in Penang and Malacca, Sabah and Sarawak (then North Borneo) and its provisions were enacted in the Malay States as follows —

(a) The Geneva Cross (Control of Use) Enactment, 1939 of the Federated Malay States (Enactment No. 5 of 1939).

(b) The Red Cross and Geneva Cross (Control of Use) Enactment, 1939 of Johore (Enactment No. 5 of 1939).

(c) The Geneva Cross (Control of Use) Enactment, 1358 of Kedah (Enactment No. 5 of 1358).

(d) The Red Cross and Geneva Cross (Control of Use) Enactment, 1358 of Perlis (Enactment No. 4 of 1358).

[1] Federal Constitution, Article 3.

(e) The Geneva Cross (Control of Use) Enactment, 1358 of Trengganu (Enactment No. 2 of 1358).

(f) The Geneva Cross (Control of Use) Enactment, 1939 of Kelantan (Enactment No. 20 of 1939).

All the above previous legislation were repealed by the Geneva and Red Cross (Control of Use) Ordinance, 1959 which consolidated the laws on the subject. This in turn was repealed by the Geneva Conventions Act, 1962.[2]

The Geneva Conventions of 1949 were given statutory effect in the United Kingdom by the Geneva Conventions Act, 1957 and this Act was followed in the Geneva Conventions Act, 1962 of the Federation of Malaya. This Act has been extended to Sabah and Sarawak by the Modification of Laws (Geneva Conventions) (Extension to Borneo States) Order, 1956 (P.U. 100/56). Each of the Four Conventions of 1949 had similar provision for the repression of abuses and infractions of the convention. Thus Articles 50-53 of the Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in armed forces in the Field provides —

ARTICLE 50

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

ARTICLE 51

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

ARTICLE 52

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

[2]Act 5 of 1982.

ARTICLE 53

The use by individuals, societies, firms or companies either public or private, other than those entitled thereto under the present Convention, of the emblem or the designation "Red Cross" or "Geneva Cross", or any sign or designation constituting an imitation thereof, whatever the object of such use, and irrespective of the date of its adoption, shall be prohibited at all times.

By reason of the tribute paid to Switzerland by the adoption of the reversed Federal colours, and of the confusion which may arise between the arms of Switzerland and the distinctive emblem of the Convention, the use by private individuals, societies or firms, of the arms of the Swiss Confederation, or of marks constituting an imitation, whether as trademarks or commercial marks, or as parts of such marks, or for a purpose contrary to commercial honesty, or in circumstances capable of wounding Swiss national sentiment, shall be prohibited at all times.

Nevertheless, such High Contracting Parties as were not party to the Geneva Convention of 27th July, 1929, may grant to prior users of the emblems, designations, signs or marks designated in the first paragraph, a time limit not to exceed three years from the coming into force of the present Convention to discontinue such use, provided that the said use shall not be such as would appear, in time of war, to confer the protection of the Convention.

The prohibition laid down in the first paragraph of the present Article shall also apply, without effect on any rights acquired through prior use, to the emblems, and marks mentioned in the second paragraph of Article 38."

Similar provisions are to be found in Articles of —

(a) the Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Articles 50-53);

(b) the Geneva Convention relative to the treatment of prisoners of war (Articles 129-132);

(c) the Geneva Convention relative to the protection of civilian persons in time of war (Articles 146-149).

Section 3 of the Geneva Conventions Act 1962 provides that any person whatever his citizenship or nationality who whether inside or outside the Federation commits or aids, abets or procures the commission by any person of any such grave breach of any of the Geneva Conventions referred to in the following articles:

(a) Article 50 of the First Convention;

(b) Article 51 of the Second Convention;

(c) Article 130 of the Third Convention; or

(d) Article 147 of the Fourth Convention,

shall be guilty of an offence and on conviction thereof

(i) in the case of such a grave breach involving the wilful killing of a person protected by the convention in question shall be sentenced to imprisonment for life;

(ii) in the case of any other such grave breach shall be liable to imprisonment for a term not exceeding fourteen years.

Article 99-108 of the Geneva Convention relative to the treatment of prisoners of war provide as follows —

ARTICLE 99

No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

ARTICLE 100

Prisoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power.

Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power upon which the prisoners of war depend.

The death sentence cannot be pronounced against a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.

ARTICLE 101

If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in Article 107.

ARTICLE 102

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

ARTICLE 103

Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

Any period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty.

The provisions of Articles 97 and 98 of this Chapter shall apply to a prisoner of war whilst in confinement awaiting trial.

ARTICLE 104

In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the Protecting Power as soon as possible and at least three weeks before the opening of the trial. This period of three weeks shall run as from the day on which such notification reaches the Protecting Power at the address previously indicated by the latter to the Detaining Power.

The said notification shall contain the following information:

(1) surname and first names of the prisoner of war, his rank, his army, regimental, personal or serial number, his date of birth, and his profession or trade, if any;

(2) place of internment or confinement;

(3) specification of the charge or charges on which the prisoner of war is to be arraigned, giving the legal provisions applicable;

(4) designation of the court which will try the case, likewise the date and place fixed for the opening of the trial.

The same communication shall be made by the Detaining Power to the prisoners' representative.

If no evidence is submitted, at the opening of a trial, that the notification referred to above was received by the Protecting Power, by the prisoner of war and by the prisoners' representative concerned, at least three weeks before the opening of the trial, then the latter cannot take place and must be adjourned.

ARTICLE 105

The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence.

The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.

Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language which he understands, and in good time before the opening of the trial. The same communication in the same circumstances shall be made to the advocate or counsel conducting the defence on behalf of the prisoner of war.

The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held in camera in the interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.

ARTICLE 106

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

ARTICLE 107

Any judgment and sentence pronounced upon a prisoner of war shall be immediately reported to the Protecting Power in the form of a summary communication, which shall also indicate whether he has the right of appeal with a view to the quashing of the sentence or the reopening of the trial. This communication shall likewise be sent to the prisoners' representative concerned. It shall also be sent to the accused prisoner of war in a language he understands, if the sentence was not pronounced in his presence. The Detaining Power shall also immediately communicate to the Protecting Power the decision of the prisoner of war to use or to waive his right of appeal.

Furthermore, if a prisoner of war is finally convicted or if a sentence pronounced on a prisoner of war in the first instance is a death sentence, the Detaining Power shall as soon as possible address to the Protecting Power a detailed communication containing:

(1) the precise wording of the finding and sentence;

(2) a summarised report of any preliminary investigation and of the trial, emphasising in particular the elements of prosecution and the defence;

(3) notification, when applicable, of the establishment where the sentence will be served.

The communications provided for in the foregoing sub-paragraphs shall be sent to the Protecting Power at the address previously made known to the Detaining Power.

ARTICLE 108

Sentences pronounced on prisoners of war after a conviction has become duly enforceable, shall be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

A woman prisoner of war on whom such a sentence has been pronounced shall be confined in separate quarters and shall be under the supervision of women.

In any case, prisoners of war sentenced to a penalty depriving them of their liberty shall retain the benefit of the provisions of Articles 78 and 126 of the present Convention. Furthermore, they shall be entitled to receive and despatch correspondence, to receive at least one relief parcel monthly, to take regular exercise in the open air, to have the medical care required by their state of health, and the spiritual assistance they may desire. Penalties to which they may be subjected shall be in accordance with the provisions of Article 87, third paragraph."

These provisions have been implemented in section 4—7 of the Malaysian Geneva Conventions Act, 1962 as follows —

4. (1) The court before which —

(a) a protected prisoner of war is brought up for trial for any offence; or

(b) a protected internee is brought up for trial for an offence for which that court has power to sentence him to death or to imprisonment for a term of two years or more,

shall not proceed with the trial until it is proved to the satisfaction of the court that a notice containing the particulars mentioned in sub-section (2), so far as they are known to the prosecutor, has been served not less than three weeks previously on the protecting power and, if the accused is a protected prisoner of war, on the accused and the prisoners' representative.

(2) The particulars referred to in sub-section (1) are —

(a) the full name and description of the accused, including the date of his brith and his profession or trade, if any, and, if the ac-

cused is a protected prisoner of war, his rank and army, regimental, personal or serial number;

(b) his place of detention, internment or residence;

(c) the offence with which he is charged; and

(d) the court before which the trial is to take place and the time and place appointed for the trial.

(3) For the purposes of this section a document purporting —

(a) to be signed on behalf of the protecting power or by the prisoners' representative or by the person accused, as the case may be; and

(b) to be an acknowledgment of the receipt by that power, representative or person on a specified day of a notice described therein as a notice under this section,

shall, unless the contrary is shown, be sufficient evidence that the notice required by sub-section (1) of this section was served on that power, representative or person on that day.

(4) In this section the expression "prisoners' representative" in relation to a particular protected prisoner of war at a particular time means the person by whom the functions of prisoners' representative within the meaning of article 79 of the convention set out in the Third Schedule were exercisable in relation to that prisoner at the camp or place at which that prisoner was, at or last before that time, detained as a protected prisoner of war.

(5) Any court which adjourns a trial for the purpose of enabling the requirements of this section to be complied with may, notwithstanding anything in any other written law, remand the accused for the period of the adjournment.

5. (1) The court before which —

(a) any person is brought up for trial for an offence under section 3; or

(b) a protected prisoner of war is brought up for trial for any offence,

shall not proceed with the trial unless —

(i) the accused is represented by counsel; and

(ii) it is proved to the satisfaction of the court that a period of not less than fourteen days has elapsed since instruc-

tions for the representation of the accused at the trial were first given to the counsel,

and if the court adjourns the trial for the purpose of enabling the requirements of this sub-section to be complied with, then, notwithstanding anything in any other written law, the court may remand the accused for the period of the adjournment.

(2) Where the accused is a protected prisoner of war, in the absence of counsel accepted by the accused as representing him, counsel instructed for the purpose on behalf of the protecting power shall, without prejudice to the requirements of paragraph (ii) of sub-Section (1), be regarded for the purposes of that sub-section as representing the accused.

(3) If the court adjourns the trial in pursuance of sub-section (1) by reason that the accused is not represented by counsel, the court shall direct that a counsel be assigned to watch over the interests of the accused at any further proceedings in connection with the offence, and at any such further proceedings, in the absence of counsel either accepted by the accused as representing him or instructed as mentioned in sub-section (2), counsel assigned in pursuance of this subsection shall, without prejudice to the requirement of paragraph (ii) of sub-section (1), be regarded for the purposes of that sub-section as representing the accused.

(4) Counsel shall be assigned in pursuance of sub-section (3) in such manner as the Minister may by order prescribe, and any counsel so assigned shall be entitled to be paid out of moneys provided by such sums in respect of fees and disbursements as the Minister may by regulations prescribe.

6. (1) Where a protected prisoner of war or a protected internee has been convicted and sentenced to death or to imprisonment for a term of two years or more, he may appeal against such conviction and sentence imposed upon him, and the time within which he must give notice of appeal shall, notwithstanding anything in the written law relating to such appeals, be the period from the date of his conviction or, in the case of an appeal against sentence, of his sentence to the expiration of ten days after the date on which he receives a notice given —

(a) in the case of a protected prisoner of war by an officer of the Armed forces of the Federation;

(b) in the case of a protected internee, by or on behalf of the governor of the prison in which he is confined,

that the protecting power has been notified of his conviction and sentence; and in a case to which the foregoing provisions of this sub-section apply, a reference to the period aforesaid shall be substituted for any reference to the

period of fourteen days after the date of such decision in sub-section (1) of section 20 of the Courts Ordinance, 1948.

(2) Where after an appeal to the Court of Appeal the sentence on a protected prisoner of war or a protected internee remains a sentence of death, or remains or has become a sentence of imprisonment for a term of two years or more, the time within which he may apply for special leave to appeal to the Yang di Pertuan Agong under sub-section (2) (c) of section 3 of the Appeals from the Supreme Court Ordinance, 1958,[3] shall be six weeks from the date on which the convicted person receives a notice given in accordance with paragraph (a) or paragraph (b) of sub-section (1), as the case may be, that the protecting power is notified of the decision of the court.

7. (1) It shall be lawful for the Minister in any case in which a protected prisoner of war or a protected internee is convicted of an offence and sentenced to a term of imprisonment, to direct that there shall be deducted from that term a period not exceeding the period, if any, during which that person was in custody in connection with that offence, either on remand or after committal for trial (including the period of the trial), before the sentence began, or is deemed to have begun, to run.

(2) It shall be lawful for the Minister in a case where he is satisfied that a protected prisoner of war accused of an offence has been in custody in connection with that offence, either on remand or after committal for trial (including the period of the trial), for an aggregate period of not less than three months, to direct that the prisoner shall be transferred from that custody to the custody of an officer of the Armed Forces of the Federation and thereafter remain in military custody at a camp or place in which protected prisoners of war are detained, and be brought before the court at the time appointed by the remand or acquittal order."

Part III of the Geneva Conventions Act, 1962 deals with the prevention of abuse of Red Cross and other emblems. It gives effect to Articles 53 and 54 of the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field. This Part of the Act has to be read in conjunction with the Malaysian Red Cross Society (Change of Name) Act, 1975[4] which prohibits the use without authority of the emblem of a red crescent on a white background and the words "Bulan Sabit Merah" or "Red Crescent". That Act also changed the name of the former Malaysian Red Cross Society to the Malaysian Red Crescent Society.

[3]Repealed by the Courts of Judicature Act, 1964 (new Act 91). Appeals to the Yang DiPertuan Agong in criminal cases have been abolished with effect from 1st January 1978 — see Act A 328 of 1976.

[4]Act 162.

The objects of the Society as set out in section 5 of the Malayan Red Cross Society (Incorporation) Act, 1965[5] are as follows —

(a) in time of peace or war, to carry on and assist in work for the improvement of health, the prevention of disease and the mitigation of suffering throughout the world;

(b) in time of war, to furnish voluntary aid to the sick and wounded both of armies and non-belligerents, to prisoners or war and to civilian sufferers from the effects of war, in accordance with the spirit and covenants of the Geneva convention for the amelioration of the conditions of the wounded and sick in armed forces in the field, signed at Geneva on the twelfth day of August, nineteen hundred and forty-nine;

(c) to perform all the duties devolved upon a national society by each nation which has acceded to the said Convention.

The question of the application of the Geneva Conventions 1949 has been raised in a number of cases in Malaysia and Singapore.

In *Public Prosecutor* v *Oie Hee Koi and Associated Appeals*[6] the accused were Malaysian Chinese, born or settled in Malaysia but whose nationality had not been proved. They were all captured during the Indonesian Confrontation campaign against Malaysian having landed and infiltrated into Malaysian territory either by boat or by parachuting. They were armed and accompanied by Indonesian military personnel. All the accused were tried, convicted and sentenced to death for offences under the Internal Security Act, S. 57 and 58. Except in one case (*Teo Boon Chai* v. *P.P.*) none of the accused claimed during the trial that he was to be treated as a prisoner of war. They appealed to the Federal Court which dismissed all but two appeals i.e. *P.P.* v *Oie Hee Koi* and *Public Prosecutor* v. *Ooi Wan Yui*[7]. In these two cases, the Federal Court allowed the appeals on the ground that as they had not been proved to be persons owing allegiance to Malaysia, they were entitled to the protection of the Geneva Convention. The Public Prosecutor in those two cases and the other accused appealed to the Privy Council. In the Privy Council it was *inter alia* argued (a) that the provisions of the Geneva Convention were also applicable to Malaysian nationals or persons owing allegiance; (b) that any contrary customary international law denying the status of prisoners of war to such persons had been abrogated by the Geneva Conventions. Lord Hodson in giving the opinion of the majority of the Privy Council said[8] (after referring to sections 2 and 4 of the Geneva Conventions Act, 1962] —

[5]Act 47 of 1965.

[6][1968] 1 M.L.J. 148.

[7][1966] 2 M.L.J. 83.

[8][1968] 1 M.L.J. 148 at p. 150f.

"Their Lordship observe first that the offences with which the accused were charged were all committed within the territorial jurisdiction of the court of trial. The direction not to proceed with the trial which is to be given in the case of protected prisoner of war is mandatory that is to say imperative in character. It seems that enactments regulating the procedure to be followed in courts are usually imperative and not merely directory. See *Maxwell* on Interpretation of Statutes, 11th edition, page 367. The direction is one which is given to the court of trial itself, that is to say to the court of first instance. It does not purport to be an ouster of jurisdiction but is a direction not to proceed until etc.

Their Lordship observe in the second place that the Act does not indicate directly whether or not a protected prisoner of war includes nationals of, or persons owing allegiance to, the captor state. Reference to the protecting power does indicate indirectly that the prisoner of war whose interest is to be protected is a national of some state other than the captor state, or a member of the forces of a party to the conflict but this leaves open the question whether prisoner of war status can be claimed by persons in the latter category who are nationals of or owe allegiance to the captor state. Where there is no protecting power designated by parties to the conflict and protection cannot be arranged accordingly it is provided by article 10 of the Convention the protecting power shall accept the services of a humanitarian organisation such as the International Committee of the Red Cross to assume the humanitarian functions performed by the protecting power under the Convention.

It is necessary to refer to the Convention (Third Schedule to the Act) in order to ascertain the extent of the protection.

Article 4 of the Convention is general in its terms and on its face is capable of including the nationals of the detaining power who are captured by that power.

Articles 4A Commences:

"Prisoners of war, in the sense of the present Convention, are person belonging to one of the following categories, who have fallen into the power of the enemy:"

Then follows a list of categories:

"(1) Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces:

(2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognisable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war;

. . . . . ."

Article 5 so far as material provides:

". . . . . .

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

The trials of the accused were conducted on the assumption, which their Lordships do not call in question, that there was an armed conflict between Malaysia and Indonesia bringing the Convention into operation. Article 2 applies the Convention not only to cases of declared war but to "any other armed conflict" which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. The existence of such a state of armed conflict was something of which the courts in Malaysia could properly take judicial notice, or if in doubt (which does not appear to have been the case) on which they could obtain a statement from the executive.

It was also assumed that both Malaysia and Indonesia are parties to the Convention and their Lordships were informed that this assumption is in accordance with the facts.[9]

Thus, whether any individual accused was entitled, under the Act of 1962, to be treated as a protected prisoner of war, would depend upon the following:

(1) Whether, as a matter of fact he was a member of the armed forces of Indonesia or of a volunteer corps forming part of such armed forces and if so

(2) Whether, as a matter of law, the Convention, and consequently the Act, applies to persons of Malaysian nationality or owing allegiance to Malaysia

(3) Whether, as a matter of fact, he was a national of Malaysia or a person owing allegiance to Malaysia.

Article 5 of the Convention is directed to a person of the kind described in article 4 about whom "a doubt arises" as to whether he belongs to any of the categories enumerated in article 4. By virtue of article 5 such a person is given the protection of the Convention for the time being, i.e., until such time as his "status has been determined by a competent tribunal". The ques-

[9]Malaysia ratified the Convention (to take effect from 24th February 1963) 445 United Nations Treaty Series p. 316); Indonesia ratified the Convention in 1959 (to take effect from 30th March 1959) 314 United Nations Treaty Series p. 332.

tion then arises whether the description "protected prisoner of war" in section 2 of the Act of 1962 includes persons entitled to provisional protection under article 5 of the Convention, as well as persons falling within article 4 of the Convention. Their Lordships are of opinion that this is the case. Thus a person to whom article 5 applies is a protected prisoner of war within section 2 of the Act of 1962 so long as that protection lasts. If the determination is positive then he is protected because he falls within one of the categories in article 4 and the provision for notice in section 4 of the Act must be complied with. If the determination is negative the protection of the Convention ceases so far as the individual is concerned and his trial can proceed free from any further restriction arising under section 4 of the Act.

When it is established that an accused person is within one of the categories in article 4 of the Convention, section 4 of the Act can be complied with only by giving the requisite notice; where it is doubtful whether a person is within one of the categories of article 4 of the Convention then so long as that position remains all that is required is that the trial shall not proceed unless the notices have been given. An enquiry into status could be directed without such a notice as section 4 of the Act does not apply to such an enquiry. Section 4 of the Act relates to all protected prisoners of war whether the protection arises under the terms of article 5 of the Convention or because it is established that an accused is within the terms of article 4 of the Convention. Where the doubt arises under article 5 of the Convention two courses are open (1) to give the notices as required by section 4 of the Act or (2) to obtain a determination whether or not the accused is a protected person. If the second course is followed and the result is negative then the prosecution can proceed without giving the notices required by section 4 of the Act. In only one of the cases did any "doubt arise" at or before their trial as to whether the accused persons belonged to any of the categories enumerated in article 4 of the Convention. This single case will be dealt with separately hereafter.

In the two cases in which the Public Prosecutor is appellant, that is to say, that of *Ole Hee Koi* and that of *Ooi Wan Yui*, already mentioned, the Federal Court on the point being taken on appeal from the trial judge held that the accused were entitled to protection. By decision of the Federal Court in the other cases where the convictions were upheld the contention that the accused were entitled to the protection of the Convention was rejected. In these cases with the single exception referred to above, no point had been raised at the trial and therefore no "doubt arose" so as to bring section 4 into operation.

Their Lordships are of opinion that on the hearing of their appeals by the Federal Court no burden lay upon the prosecution to prove that those of the accused who had raised no doubt at their trials as to the correctness of the procedure followed were not entitled to be treated as protected prisoners of war. Although the burden of proof of guilt is always on the prosecution this does not mean that a further burden is laid on it to prove that an accused person has no right to apply for postponement of his trial until certain procedural steps have been taken. Until "a doubt arises" Article 5 does not operate and the court is not required to be satisfied whether or not this safeguard should be applied. Accordingly where the accused did not raise a doubt no question of mistrial arises.

The only authority to which their Lordships' attention was drawn which supports the view that the Geneva Convention, or rather its predecessor which used similar language, applied so to speak automatically without the question of protection or no protection being raised is the case of *Rex.* v. *Giuseppe*

& Ors.[10]. Twelve Italian prisoners of war were tried by a magistrate and convicted on a charge of theft no notice having been given to the representative of the protecting power as required by the Convention. It was held on an application for review at the special request of the Crown that the conviction and sentences should be set aside. Thus it appears that the Crown asked for review in a case where the prisoners of war were nationals of the opposing forces and plainly entitled to the protection of the Convention.

Their Lordships do not regard this decision as good authority for the proposition that there was a mistrial in the cases under review.

The position of the accused was covered prima facie by customary international law as stated in the passage which appears on page 268 of Volume 2 in the 7th edition on Oppenheim's International Law edited by the late Professor Lauterpacht concerning the armed forces of belligerents. This passage cited by Thomson L.P. in the Federal Court[11] in *Lee Hoo Boon's* case reads as follows:

"The privileges of members of armed forces cannot be claimed by members of the armed forces of a belligerent who go over to the forces of the enemy and are afterwards captured by the former. They may be, and always are, treated as criminals. The same applies to traitorous subjects of a belligerent who, without having been members of his armed forces, fight in the armed forces of the enemy. Even if they appear under the protection of a flag of truce, deserters and traitors may be seized and punished."

This edition was published in 1951 after 12th August 1949 the date of the Geneva Conventions and in their Lordships' opinion correctly states the relevant law.

A study of the Convention relative to the treatment of prisoners of war leads to a strong inference that it is an agreement between states primarily for the protection of the members of the national forces of each against the other. Many of the articles of the Convention lead to this conclusion but there are two which point convincingly in this direction namely articles 87 and 100. The former deals with penalties to which prisoners of war may be sentenced by the detaining power and contains this language:

"When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will."

Article 100 deals with death sentences and contains these words:

"The death sentence cannot be pronounced against a prisoner of war unless the attention of the court has, in accordance with article 87, second paragraph (supra), been particularly called to the fact that since the accused is not a national of the detaining power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will."

Each of these articles appears to rest upon the assumption that a "prisoner of war" is not a "national of the detaining power". Moreover the reference to the duty of allegiance might fairly suggest the further inference that a person who owes this duty to a detaining power is not entitled to prisoner of war

[10](1943) S.A.L.R. (Transvaal) 139.

[11][1966] 2 M.L.J. 167.

treatment. If the matter rested on inference from these articles alone, the argument might not be conclusive, but as has been shown, the inference so to be drawn coincides, as regards nationals of the detaining power, with commonly accepted international law.

On behalf of four of the accused Lee Hoo Boon (No. 13 of 1967), Lee Siang (No. 14 of 1967), Lee Fook Lum (No. 16 of 1966) and Lee A Ba (No. 36 of 1966) an argument was addressed to their Lordships that even nationals of the detaining power are entitled to the benefit of the Geneva Convention.

Reliance was placed on articles 82 and 85 of the Convention as dealing with prisoners of war generally. These persons are said to be subject to the laws in force in the armed forces of that detaining power (article 82) and when prosecuted under the laws of the detaining power for acts committed prior to capture they are said to retain even if convicted the benefits of the present Convention (article 85). Thus it is argued that the customary international law set out in the passage from Oppenheim quoted above has been in effect abrogated. Their Lordships do not accept this submission and have already given reasons for reading the Convention as concerned with the protection of the subjects of opposing states and the nationals of other powers in the service of either of them and not directed to protect all those whoever they may be who are engaged in conflict and captured.

It appears, on examination, that article 85 was inserted in the Convention to deal with a limited and particular case of persons accused of violations of the articles of war of war crimes (see *Re Yamashita*[12]) and that no general change in customary international law was intended.

The principal authority relied on for the argument that all captured persons are to be treated alike is *In re Territo,*[13] a decision of the Circuit Court of Appeal (Ninth Circuit) dated 8th June 1946.

The question there under appeal was whether the petitioner's restraint by the authorities as a prisoner of war was justified or whether he was entitled to a writ of habeas corpus. The citizenship of the petitioner was immaterial to the decision. His detention did not depend on whether or not he has a citizen of the United States of America. The passage relied on reads as follows:

"We have reviewed the authorities with care and we have found none supporting the contention of the petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle."

The following passage refers expressly to various authorities which do not support the convention that the particular protection relied upon by the majority of the appellants extends to nationals of the detaining power who fall into that power's hands. Notwithstanding the words used by the court their Lordships do not therefore find this decision assists the argument for the appellants.

Having reached the conclusion that the Convention does not extend the protection given to prisoners of war to nationals of the detaining power, their Lordships are of opinion that the same principle must apply as regards persons who, though not nationals of, owe a duty of allegiance to the detaining power. It may indeed be said that allegiance is the governing principle whether

[12][1946] 327 U.S. 1.

[13][1946] 156 Fed. Rep. (2nd) 142.

based on citizenship or not. Whether the duty of allegiance exists or not is a question of fact in which a number of elements may be involved. In this connection it is convenient to refer to the case of *Joyce* v. *Director of Public Prosecutions*[14] which concerned an American citizen who resided in British territory for about 24 years and had obtained a British passport. The question was asked in the speech of Lord Jowitt, Lord Chancellor, at page 368 whether there was not in that case such protection still afforded by the sovereign as to require of him the continuance of his allegiance.

The continuance of allegiance may be shown in a variety of ways and it is unnecessary in the circumstances of these cases to give illustrations but it is useful to refer to a decision of the Special Criminal Court Transvaal delivered later in the same year as *Joyce's* case namely *Rex* v. *Neumann Transport*.[15] It was there held that an alien who has taken the oath of allegiance to His Majesty King George VI, even after his departure from the Union, might still have enjoyed its protection and owed a consequent debt of allegiance and that the circumstances of his residence within the union and notwithstanding his departure were matters to be determined by evidence in order to decide whether accused owed allegiance to the state and whether his departure terminated it.

It was not proved that the accused were citizens of Malaysia nor that they owed allegiance to Malaysia, though in many cases there was evidence which, if the issue had directly arisen might have suggested that they did. But further findings of fact would have been required to decide either question. Except in the one case where the accused claimed the protection of the Convention at the trial there was no mistrial in proceeding without the notices required by section 4 having been given. There was nothing to show that the accused were protected prisoners of war or to raise a doubt whether they were or were not. The mere fact that they landed as part of the Indonesian armed forces did not raise a doubt and no claim was made to provide any basis for the court, before whom the accused were brought for trial, applying section 4 of the Act except in the one case.

In this single case, that of *Teo Boon Chai* v. *The Public Prosecutor* (No. 15 of 1967), it appears from page 4 of the Record that the accused's counsel claimed that his client was not a Malaysian citizen and not an Indonesian citizen either so that he should therefore be treated as a prisoner of war under the Geneva Convention. The claim was brushed aside on the wrong basis *videlicet* that jurisdiction was in question. In the Federal Court the point was taken that it was for the accused to prove that he was entitled to protection and he did not do so.

The claim having made to the court before whom the accused was brought up for trial in the circumstances already stated was in their Lordships' opinion sufficient to raise a doubt whether he was a prisoner of war protected by the Convention. The court should have treated him as a prisoner of war for the time being and either proceeded with the determination whether he was not protected or refrained from continuing the trial in the absence of notices.

In this case only their Lordships consider that there was a mistrial and that justice requires that the appeal be allowed and the convictions quashed and the case remitted for retrial.

[14][1946] A.C. 347.

[15][1946] S.A.L.R. (Transvaal) 1238.

In the remaining cases there was no mistrial by reason of the absence of the notices required by section 4. It is unnecessary to decide whether, if the accused were otherwise entitled to the protection of the Convention, the Convention did not attach since by abandoning their uniforms they were liable to be treated as spies to whom article 4 has no application. Further findings of fact would be necessary before a decision could be reached on this matter.

Returning to the charges made against the accused under the Internal Security Act, the point has been taken or adopted during the course of the hearing before their Lordships on behalf of all those of the accused who were convicted, under section 58 of that Act, of consorting with persons carrying or having possession of arms or explosives in contravention of section 57, that the convictions were bad since the only persons with whom they were alleged to have consorted were Indonesian soldiers who were not persons to whom section 57 applied.

Their Lordships are of opinion that this submission is well founded and that these convictions ought not to be allowed to stand. True that the language of section 57 covers "any person" but upon its proper construction section 57 cannot be read so widely as to cover members of the regular Indonesian armed forces fighting as such in Malaysia in the course of what, it has been assumed, was an armed conflict between Malaysia and Indonesia. The Act is an Internal Security measure part of the domestic law and not directed at the military forces of a hostile power attacking Malaysia. It would be an illegitimate extension of established practice to read section 58 as referring to members of regular forces fighting in enemy country. Members of such forces are not subject to domestic criminal law. If they were so subject they would be committing crimes from murder downwards in fighting against their enemy in the ordinary curse of carrying out their recognised military duties. It should be added that it was never argued that section 57 itself had no application to the accused as being irregular or volunteer Indonesian soldiers."

The minority judgment in this case (Lord Guest and Sir Garfield Barwick) agreed with the majority view in dismissing all the appeals, but disagreed in regard to the case of *Teo Boon Chai*, where the majority held there had been a mistrial and that as the accused had claimed that he was not a Malaysian or an Indonesian citizen, this was sufficient to raise a doubt whether he was a protected prisoner or not and the court should have treated him as a prisoner of war for the time being. The minority were of the view that the accused had not in fact raised or pressed the claim that he was a protected prisoner and that his case was on all fours with the remaining cases. On the other point whether the members of the Indonesian Armed Forces were amenable to the provisions of section 57(1) the Internal Security Act (relating to the unlawful provision of arms and ammunition), the minority said —

"The argument which has found favour with the majority of the Board is that the Indonesian Armed Forces are not amenable to the provisions of section 57(1). We may be permitted to ask the theoretical question "why". The language of the section is universal and intractable; in terms it is applicable to all persons, including belligerents. It is not suggested that the defence of "lawful excuse" or "lawful authority" is open to the members of the Indonesian Armed Forces. The accused are and were at material times subject to the

territorial jurisdiction of the court and so, subject to the Geneva Convention, were the members of the Indonesian Armed Forces. Of course, if the language of the statute is tractable, it should be construed so as to conform to international obligations. But apart from the fact that the express language of the statute is in truth intractable, we know of no rule of international law which suggests that the national laws may not be applied to the armed forces of an enemy which invade the national territory. Many political reasons may exist for not attempting to apply some laws to armed invaders in wartime but these are at present irrelevant. Not only do we not find any rule of international law to which the national law ought in comity to conform but it seems to us that the very conventions with which these appeals are concerned itself set the only limitation upon the operation of the national law in relation to captured enemies. That they may be tried for breaches of the national law is basic to the structure of the Convention: it merely seeks to have procedural limitations placed upon their trial. There is nothing in the Convention to suggest that the offences for which the prisoners may be tried are limited to offences committed after capture. We can see no reason therefore why a member of the Indonesian Armed Forces could not be prosecuted for an offence under section 57(1). To hold that the Indonesian Armed Forces were not amenable to the provisions of section 57(1) would, in our view, amount to an unwarrantable limitation on the power of the Malaysian Government to legislate for the security of the area."

The case of ***Public Prosecutor*** v. ***Oie Hee Koi and others*** (supra) has been criticised as the Privy Council would appear to have taken a restrictive interpretation of the Geneva Convention.[16] There was apparently no doubt that the respondents were "members of the armed forces of a party to the conflict." Even if it had been argued that they were "guerillas" and operating behind enemy lines, it is clear from authority that members of regular forces who fight in uniform behind enemy lines though isolated from their main force which still exists are entitled to full combatant and thus prisoner of war status.[17] This point was not however raised.

Prima facie therefore it would appear that the respondents came clearly within the definition in the 1949 Geneva Convention. The main point decided by the Privy Council was that a national of the detaining State cannot be a prisoner of war. In coming to this decision the Privy Council would appear, with respect to have confused the position of a person in his municipal law and his position in international law. While it may be that the internal law of the state will probably regard the person as guilty of treason, it is submitted that this does not abrogate the rights and protection which a captured enemy combatant has under the Prisoner of War

[16] See Susan Elman, Prisoners of War under the Geneva Convention, (1969) I.C.L.Q. 178; R.R. Baxter, The Privy Council on the Qualifications of Belligerents (1969) A.J.I.L. 290; S. Jayakumar, Judicial Decisions On Prisoners of War Questions arising from Indonesia's Confrontation against Malaysia (1968) 10 M.L.R. 339.

[17] See Stone, Legal Controls of International Conflicts (1959) p. 564 n. 14; Oppenheim International Law Vol. II (4th Edition) S. 60; R.R. Baxter "So-called Unpriveleged Belligerency: Spies, Guerillas and Saboteurs" (1951) 28 B.Y.I.L. 323, at p. 333; Susan Elman, Prisoners of War under the Geneva Convention (1969) I.C.L.Q. 178, 179.

Convention, at least until his trial for treason. Both in the Federal Court and in the Privy Council in the case of *Public Prosecutor* v. *Oie Hee Koi* (supra) reference was made to a passage in Oppenheim's International Law (7th Ed.) Vol. 2 p. 268.

> "The privileges of members of armed forces cannot be claimed by members of the armed forces of a belligerent who go over to forces of the enemy and are afterwards captured by the former. They may, and always are, treated as criminals. The same applies to traitorous subjects of a belligerent who without having being members of his armed forces, fight in the armed forces of the enemy. Even if they appear under the protection of a flag of truce, deserters and traitors may be seized and punished."

It has been suggested that this passage is referring to the municipal law and cannot affect the position under the Geneva Conventions.[18] Even if it refers to the position of the persons at international law it was argued in ***P.P.*** v. ***Oie Hee Koi*** that the customary international law so set out has been abrogated.

The crux of the Privy Council's argument was that the 1949 Convention does not apply to such persons because "a study of the Convention leads to a strong inference that it is an agreement between States primarily for the protection of the members of the national forces of each against the other." The Privy Council goes on to quote Articles 87 and 100 in support of this contention. It may be that the situation envisaged by the drafters of the Convention was that of the normal conflict between two or more national states, each side fighting with forces made up of its own nationals. Is there any reason however why the convention cannot be said to extend to other situations so far as it is not expressly excluded by the Convention? The Privy Council rejected such an interpretation when it said[19]

> "Their Lordships — have already given reasons for reading the Convention as concerned with the protection of the subjects of opposing states and the nationals of other powers in the service of either of them, and not directed to protect all those whoever they may be who are engaged in conflict and captured."

It is submitted again with respect that the Privy Council took too restrictive a view of the Convention. The definition of a prisoner of war in Article 4 contains no reference to nationality — to that extent it would appear that nationals who fight with enemy forces are not expressly excluded from the benefits of the Convention. This is in direct contrast with the Convention relative to the Protection of Civilian Persons in Time of War which, both in Articles 4 and 13, makes specific reference to the nationality of the persons protected by that Convention. Nor is there any mention of nationality in the earlier equivalent Conventions on prisoners of war.

[18] Susan Elman *op.cit.* p. 180.

[19] [1968] 1 M.L.J. 148 at p. 153.

In so far as there is no treaty rule to deal specifically with the case it is legitimate to consider the customary law for guidance. Again among writers, members of the enemy armed forces are regarded as lawful combatants without any reference to nationality. Hall for instance in International Law (8th Ed.) p. 848 says, "All persons whom a belligerent may kill become his prisoners of war on surrendering or being captured".

Flory in his book *Prisoners of War* (1942) states —

> "Persons who have deserted from the armed forces of the capturing state and individuals who owe allegiance to the capturing state may be deprived of treatment as prisoners of war. Unless they are mentioned by name or by reasonable intention as entitled to special treatment they are excluded from the benefits stated in the capitulation."

However he then quotes examples of state practice where nationality alone has not been regarded as affecting the status of those fighting in the armed forces. For example during the Boer War the British Secretary of War stated, "It is understood that some prisoners of Irish nationality are interned in Ceylon and St. Helena. They cannot be treated differently from other prisoners of war".

The Privy Council referred to the case of *In re Territo*[20], a decision of the Circuit Court of Appeal (9th Circuit) in the United States. In that case a soldier in the Italian army had been captured in Italy and was held by the U.S. military authorities as a prisoner of war. On an application for a writ of habeas corpus he claimed *inter alia* that he "at all times has been and is an American citizen" and could not therefore be held as a prisoner of war. Territo was born in the USA though of Italian citizen parents. The Privy Council held that "the various authorities (cited) — do not support the contention that the particular protection relied on by the majority of the appellants extends to nationals of the detaining power who fall into that power's hands". The Privy Council appears however to have ignored the decision in that case. According to the District Court —

> "That in conformity with Article I of the Geneva Convention (of 1929) by reference to the regulations annexed to the Hague Article 3, a treaty between the U.S. and Italy, petitioner was captured on the field of battle at a time when he was a member of the armed forces of a belligerent party, to wit Italy, and at the time when the U.S. and Italy were at war and in open conflict — that it is immaterial to the legality of the petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America".

On appeal the Circuit Court of Appeal upheld in every respect the lower court's decision. They said[21]

[20](1946) 156 Fed. Rep. (2nd) 142.

[21]*Ibid* at p. 145.

> "We have reviewed the authorities with care and we have found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle.
>
> Those who have written texts upon the subject of prisoners of war agree that all persons who are active in opposing an army in war may be captured and except for spies and other non-uniformed plotters and actors for the enemy are prisoners of war".

The Geneva Conventions have been hailed as a chapter in the international protection of human rights. The emphasis throughout the convention is on the importance of the rights and privileges which prisoners of war ought to enjoy, thus recognising the fact "that prisoners of war are the victims of events and not criminals". Article 7 of the Convention specifically provides "Prisoners of War may in no circumstances renounce in part or in entirety the rights secured to them by the present Conventions". Article 4 itself is a clear improvement and extension of earlier definitions of prisoners of war surely done in an attempt to include as many persons as possible within the scope of the Convention. As Baxter says "the current tendency of the law of war appears to be to extend the protection of prisoner of war status to an ever-increasing group".[22] As far as international law is concerned therefore it is difficult to see why the accused in *Public Prosecutor* v. *Oie Hee Koi* should not have benefited from prisoners of war status. It may be that at municipal law they could have been tried for treason, but this should not affect their status at international law.

Having reached the conclusion that the Convention did not extend the protection given to prisoners of war to nationals of the detaining power, the Privy Council expressed the opinion that the same principle must apply as regards persons who, though not nationals of, owe a duty of allegiance to the detaining power. "It may indeed be said that allegiance is the governing principle whether based on citizenship or not. Whether the duty of allegiance exists or not is a question of fact in which a number of elements may be involved."

However, the Privy Council found that in the cases before it

> "it was not proved that the accused were citizens of Malaysia nor that they owed allegiance to Malaysia, though in many cases there was evidence, which if the issue had directly arisen might have suggested that they did. But further findings of fact would have been required to decide either question. Except in the one case where the accused claimed the protection of the Convention at the trial there was no mistrial in proceeding without the notice required by section 4 having been given. There was nothing to show that the accused were protected prisoners of war or to raise a doubt whether they were or were not. The mere fact that they landed as part of the Indonesian armed forces did

[22] R.R. Baxter, Spies, Guerillas and Saboteurs in (1951) 28 B.Y.I.L. 323 at p. 343.

not raise a doubt and no claim was made to provide any basis for the court before whom the accused were brought for trial, applying section 4 of the Act except in one case."

The position of the Privy Council appears to be that a member of the enemy forces may be denied the standing of a prisoner of war by the detaining power in its discretion, unless the detained person raises the contention that he is not a national of and does not owe allegiance to the detaining power. In that event, he remains in the status of a prisoner of war, until his status has been determined by a "competent tribunal. The majority in the Privy Council did not expressly state whether the burden of establishing that the individual falls within Article 4 of the Convention rests on him or whether the detaining power has the burden of establishing that a person who seems to be a member of the enemy armed forces actually falls outside the scope of Article 4 as interpreted. However the two dissenting members (Lord Guest and Sir Garfield Barwick) took the advice of the Board to be that the onus was on the accused to prove that they came within the Convention.

It has been submitted that the better view is that a person who outwardly seems to meet the requirements of Article 4, but whose nationality or allegiance is in question should be put before a competent tribunal under Article 5 and must until that time be treated as a prisoner of war. The proper procedure in the cases would have been for the High Court to have made the determination about the position of the accused. If the accused could have established that they were members of the Indonesian armed forces, then the burden would then have fallen on the prosecution to demonstrate that the accused were nationals of or owed allegiance to Malaysia and hence should not be treated as prisoners of war. If it could be established that they owed no allegiance to Malaysia, they would be immune from prosecution for having borne arms and for having consorted with other persons bearing arms. If they had been found to owe allegiance to Malaysia, they could properly have been treated like any other nationals and prosecuted under the Internal Security Act.[23]

Although in the cases of *P.P.* v. *Oie Hee Koi and others* (supra) there was evidence that the accused had been apprehended while they were in civilian clothes the point was not taken that the accused had thereby forfeited their right to protection as prisoners of war. This particular point was specifically dealt with in two cases in Singapore.

In *Osman and another* v. *Public Prosecutor*[24] the appellants were two Indonesians who were arrested, charged and convicted for murder of three Singapore civilians. Their death occurred as a result of an explosion at a

[23] R.R. Baxter, The Privy Council on the qualifications of belligerents" in (1969) 63 A.J.I.L. 290 p. 293.

[24] [1968] 2 M.L.J. 137 Reported as *Mohamed Ali & Anor* v. *P.P.* in [1968] 3 All E.R. 488.

busy commercial building (Macdonald House, Orchard Road). The appellants were alleged to be responsible for the explosion and to have infiltrated into Singapore from Indonesia for such purpose. At the time of the arrest they were not in uniform. The Federal Court held on appeal from the High Court that there could not be the least doubt that the explosion at Macdonald House was not only an act of sabotage but one totally unconnected with the necessities of war. They went on to say.[25]

> "It seems to us clearly beyond doubt that under international law a member of the armed forces of a party to the conflict who out of uniform and in civilian clothing sets off explosives in the territory of the other party to the conflict in a non-military building in which civilians are doing work unconnected with any war effort forfeits his right to be treated as a prisoner of war".

They consequently held that the appellants were not prisoners of war within the meaning of the Geneva Convention. Their appeal to the Privy Council was dismissed.

Viscount Dilhorne giving the judgment of the Privy Council said[26]

> "It is first necessary to consider the Regulations annexed to the Hague Convention concerning the Laws and Customs of War on Land of 1907. The first section of those Regulations is headed "Of Belligerents" and article 1 is the first article in that section and in the Chapter headed "The Status of Belligerents". It reads as follows —
>
> "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions —
>
> (1) to be commanded by a person responsible for his subordinates;
>
> (2) to have a fixed distinctive emblem recognisable at a distance;
>
> (3) to carry arms openly; and
>
> (4) to conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'."

Chapter II of this section is headed "Prisoners of War". The Regulations do not in terms say that a person with the status of belligerent is on capture entitled to be treated as a prisoner of war but that is clearly implied. As Dr. Jean Pictet said at page 46 in the "Commentary on the Geneva Convention" published by the Red Cross in 1960 —

[25] [1967] 1 M.L.J. 137 at p. 139.

[26] [1968] 2 M.L.J. 137 at p. 140.

"Once one is accorded the status of a belligerent, one is bound by the obligations of the laws of war, and entitled to the rights which they confer. The most important of these is the right, following capture, to be recognised as a prisoner of war."

Article 29 of the Regulations reads as follow —

"A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Accordingly, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies . . ."

Article 31 says —

"A Spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war . . ."

These two articles show that soldiers who spy and are captured when wearing a disguise are not entitled to be treated as prisoners of war. In "War Rights on Land" by Mr. J.M. Spaight published in 1911 the following appears at page 203 —

"The spy is usually a soldier who has abandoned the recognised badge of his craft and his nation and adopted some disguise to shield his real character and intent. He has thrown away the insignia of his status, the evidence of his brotherhood among fighting men . . . The spy in modern war is usually a soldier who dons civilian dress, or the uniform of the enemy, or of a neutral country . . ."

Article 4 of the Geneva Convention added a number of new categories of persons entitled to treatment as prisoners of war. It is only necessary to refer to article 4A, sub-paragraphs (1), (2) and (3). They read as follows —

"4A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy —

(1) members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces;

(2) members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, providing that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions —

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognisable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war;

(3) members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power."

The wording of sub-paragraphs (1) and (2) is clearly modelled on article 1 of the Hague Regulations. The conditions which have to be fulfilled by militias and volunteer corps not forming part of the army or armed forces are the same.

There is no indication in the Convention that its intention was to extend the protection given to soldiers beyond that given by the Regulations; and in the Manual of Military Law Part III (1958) in paragraph 96 it is stated —

"Should regular combatants fail to comply with these four conditions, they may in certain cases become unprivileged belligerents. This would mean that they would not be entitled to the status of prisoners of war upon their capture. Thus regular members of the armed forces who are caught as spies are not entitled to be treated as prisoners of war."

On this basis the conclusion must be drawn that it does not suffice in every case to establish membership of an armed force to become entitled on capture to treatment as a prisoner of war.

In neither the Hague Regulations nor in the Geneva Convention is it expressly stated that a member of the armed forces has to be wearing uniform when captured to be entitled to be so treated. In the case of certain militias and volunteer corps certain conditions have to be fulfilled in relation to those bodies for a member of them to be entitled to treatment as a prisoner of war. It is not, however, stated that such a member must at the time of his capture be wearing "a fixed distinctive sign recognisable at a distance".

International law, however, recognises the necessity of distinguishing between belligerents and peaceful inhabitants. "The separation of armies and peaceful inhabitants" wrote Spaight in "War Rights on Land", supra, at page 37 "is perhaps the greatest triumph of international law. Its effect in mitigating the evils of war has been incalculable". Although paragraph 86 of the Manual of Military Law, supra, recognises that the distinction has become increasingly blurred, it is still the case that each of these classes has distinct rights and duties.

For the "fixed distinctive sign to be recognisable at a distance" to serve any useful purpose, it must be worn by members of the militias or volunteer corps to which the four conditions apply. It would be anomalous if the requirement for recognition of a belligerent with its accompanying right to treatment as a prisoner of war, only existed in relation to members of such forces and there was no such requirement in relation to members of the armed forces. All four conditions are present in relation to the armed

forces of a country or, as Professor Lauterpacht in Oppenheim's International Law 7th Edition volume II at page 259 calls them "the organised armed forces". In "War Rights on Land", supra, Mr. Spaight says at page 56; in relation to article 1 of the Regulations —

> "The four conditions must be united to secure recognition of belligerent status."

Pictet at page 48 of the Commentary on the Geneva Convention, supra, says —

> "The qualification of belligerent is subject to these four conditions being fulfilled."

and at page 63 in relation to sub-paragraph (3) of article 4A —

> "These 'regular armed forces' have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1): they wear uniform, they have an organised hierarcy and they know and respect the laws and customs of war."

In relation to troops landed behind enemy lines, Professor Lauterpacht at page 259 of Oppenheim, supra, says that so long as they —

". . . are members of the organised forces of the enemy and wear uniform, they are entitled to be treated as regular combatants even if they operate singly."

Thus considerable importance attaches to the wearing of uniform or a fixed distinctive sign when engaging in hostilities. In an article in the British Year Book of International Law 1951 by Major R.A. Baxter entitled "So-called 'unprivileged Belligerency': Spies, Guerillas and Saboteurs" the author at page 343 says —

> "The correct legal formulation is, it is submitted, that armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy. 'Unlawful belligerency' is actually 'unprivileged belligerency'. International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponents. The peril to the enemy inherent in attempts to obtain secret information or to sabotage his facilities and in attacks by persons whom he often cannot distinguish from the peaceful population is sufficient to require the recognition of wide retaliatory powers. As a rough-and-ready way of distinguishing open warfare and dangerous dissimulation, the character of the clothing worn by the accused has assumed major importance. The soldier in uniform or the member of the volunteer corps with his distinctive sign have a protected status upon capture, whilst other belligerents not so identified do not benefit from any comprehensive scheme of protection."

In his "Legal Controls of International Conflict" (1954) Professor Julius Stone at page 549 in relation to the distinction between privileged or "protected" or "lawful" and unprivileged or "unprotected" or "unlawful" belligerents or combatants, says —

> "The latter distinction draws the line between those personnel who, on capture, are entitled under internationall law to certain minimal treatment as prisoners of war, and those not entitled to such protection. 'Non-combatants' who engage in hostilities are one of the classes deprived of such protection, but there are also many others. These include notably military personnel who conduct hostilities without conforming to the requirements of article 1 of the Hague Regulations ('guerillas' in the strict sense), spies, and saboteurs."

This seems to indicate that he regarded the donning of civilian clothes by soldiers to commit sabotage as depriving them of the status of privileged belligerents.

In this appeal it is not necessary to attempt to define all the circumstances in which a person coming within the terms of article 1 of the Regulations and of article 4 of the Convention as a member of an army or armed force ceases to enjoy the right to be treated as a prisoner of war. The question to be decided is whether members of such a force who engage in sabotage while in civilian clothes and who are captured so dressed are entitled to be treated as protected by the Convention.

In paragraph 96 of the Manual of Military Law, supra, it is stated that —

> "Members of the armed forces caught in civilian clothing while acting as saboteurs in enemy territory are in a position analogous to that of spies".

and in paragraph 331 —

> "If they are disguised in civilian clothing or in the uniform of the army by which they are caught or that of an ally of that army, they are in the same position as spies. If caught in their own uniform, they are entitled to be treated as prisoners of war."

In "The Law of Land Warfare" (1956) the American equivalent to the Manual of Military Law, the following paragraph appears —

> "74. Necessity of uniform. Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces."

In *Ex parte Quirin,*[27] the United States Supreme Court had to consider motions for leave to file petitions for writs of habeas corpus. The case related to a number of Germans who during the course of the last war landed in uniform on the shores of the United States with explosives for the purpose of sabotage. On landing they put on civilian clothes. They were captured. In the course of delivering the judgment of the Supreme Court, Chief Justice Stone said[28] —

> "The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war . . ."

and[29]

> "By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.".

> In the light of the passages cited above, their Lordships are of the opinion that under international law it is clear that appellants, if they were members of the Indonesian armed forces, were not entitled to be treated on capture as prisoners of war under the Convention when they had landed to commit sabotage and had been dressed in civiliani clothes both when they had placed the explosives and lit them and when they were arrested. In their opinion Chua J. and the Federal Court were right in rejecting the appellants' plea on this ground."

In *Stanislaus Krofan and other* v. *Public Prosecutor*[30] the accused were Indonesians who were captured in Singapore and were found to be in possession of explosives. Although they were in civilian clothing, they claimed that they were members of the armed forces of Indonesia and under orders of their superiors to set up explosives at certain strategic points in Singapore. They were charged and convicted for offences under S. 57(1)(b) of the Internal Security Act. The substantive issue in the case was again whether members of the armed forces of a party to the conflict who enter enemy territory dressed in civilian clothes to committ acts of sabotage are prisoners of war in the sense of the Geneva Convention.

The Federal Court in Singapore held that the appellants were not entitled to prisoner of war status and stated that a regular combatant who divested himself of his most distinctive characteristic, his uniform, for the

[27] [1942] 63 S. Ct. 1; 317 U.S. 1; 87 Law. Ed. 3.

[28] *Ibid* at p. 12.

[29] *Ibid* at p. 15.

[30] [1967] 1 M.L.J. 133.

purpose of spying or sabotage thereby forfeited his right on capture to be treated as a prisoner of war. The Federal Court referred to the Hague Regulations, the U.K. Manual of Military Law and the case of *Ex parte Quirin*[31] to show that prior to the Geneva Convention, prisoner of war status could not be claimed by regular combatants who were disguised to act as spies or saboteurs. Turning to the Geneva Convention, the Federal Court felt that the definition in Article 4A(1) did not in anyway alter the unprotected position of the "soldier" spy or the "soldier" saboteur. Wee Chong Jin C.J. said[32] —

> "The conditions of modern warfare are not such as to make the spy or the saboteur any less dangerous or more easily distinguishable or more easily apprehended than at the time of the Hague Regulations".

While the Geneva Conventions have been acceded to by Malaysia in 1962 Malaysia has not so far acceded to the Protocols of 1977. The Protocols supplement the Convention in regard to prisoner of war status. Thus Article 4 of the Geneva Convention III of 1962 is supplemented by Articles 43 and 44 of the 1977 Protocol. Article 43 of the Protocol states that the armed forces of a party to a conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognised by an adverse party. Such armed forces shall be subject to an internal disciplinary system, which *inter alia* shall enforces compliance with the rules of international law applicable in armed conflict. Under the Geneva Conventions the following four conditions are prescribed for members of militias and volunteer corps that is a responsible commander, distinct uniforms or symbol, carrying of arms openly and law abiding attitude in respect of the laws and customs of war. In the case of armed forces it is assumed that these conditions are inherent, for regular armed forces are organized, they are commanded by a person responsible for his subordinates and they are obliged under international law to conduct their operations in accordance with the laws and customs of war. The Protocol specifically requires a responsible commander and internal discipline among members of the armed forces.

Article 44 provides that any combatant as defined in article 43 who falls into the power of an adverse party shall be a prisoner of war. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or if he falls into the power of an adverse party of his right to be a prisoner of war except as provided in paragraphs 3 and 4 of the Article. Paragraph 3 provides that in order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the

[31](1942) 317 U.S. 1; 87 Law Ed. 3.

[32][1967] 1 M.L.J. 133 at p. 136.

civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognising however that there are situations in armed conflicts where, owing to the nature of hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that in such situations he carries his arms openly (a) during each military engagement and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Paragraph 4 provides that a combatant who falls into the power of an adverse party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war but he shall nevertheless be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by the First Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in a case where such a person is tried and punished for any offences he has committed. Paragraph 5 provides that any combatant who falls into the power of an adverse party while not engaged in an attack does not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities. Paragraph 6 provides that Article 44 is without prejudice to the right of any person to be a prisoner of war pursuant to article 4 of the Third Convention; and paragraph 7 provides that the article is not intended to change the generally accepted practice of states with respect to the wearing of uniform by combatants assigned to the regular, uniformed units of a party to the conflict. Paragraph 8 provides that in addition to the categories of persons mentioned in the First and Second Conventions, all members of the armed forces of a party to a conflict as defined in Article 43 shall be entitled to protection under those Conventions if they are wounded or sick or in the case of the second convention shipwrecked at sea or in other waters.[33]

Article 45 provides that a person who takes part in hostilities and falls into the power of an adverse party shall be presumed to be a prisoner of war and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status or if the party on which he depends claims such status on his behalf by notification to the detaining power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and therefore to be protected by the Third Convention and the First Protocol until such time as his status has been determined by a competent tribunal. If a person who has fallen

[33] Articles 43 and 44 of the Protocol together reaffirm the provisions of Article 85 of the Third Convention which provides that prisoners of war retain their status as such notwithstanding allegations and convictions of precapture offences. They thus preclude any attempt to deny prisoner of war status to members of independent or regular armed forces on the allegation that their force does not enforce some provision of customary or conventional law of armed conflict as construed by the detaining power. See *Military Prosecutor* v. *Kassem & Ors.* (Israeli Military Court) 42 International Law Reports 470).

into the power of an adverse party is not held as a prisoner of war and is to be tried by that party for an offence arising out of hostilities, he shall have the right to assert his entitlement to prisoner of war status before a judicial tribunal and to have that question adjudicated. Whenever possible this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which such question is adjudicated, unless exceptionally the proceedings are held *in camera* in the interest of state security, in which case the detaining power shall advise the protecting power accordingly. Any person who has taken part in hostilities who is not entitled to prisoner of war status and who does not benefit from more favourable treatment in accordance with the fourth Convention shall have the right at all times to the protection of article 75 of the First Protocol (relating to fundamental guarantees). In occupied territory such a person unless he is held as a spy shall also be entitled, notwithstanding Article 5 of the fourth Convention, to his rights of communication under that Convention.

The First Protocol does not affect the rule relating to spies. Under the practice of states and customary international law, members of the regular armed forces of a party to the conflict are deemed to have lost their right to be treated as prisoners of war wherever they deliberately concealed their status in order to pass behind the military lines of the adversary for the purposes of (a) gathering military information or (b) engaging in acts of violence against persons or property.[34] Initially however they are all entitled to be treated as prisoners of war under articles 5 and 45 of the Third Convention and the Protocol respectively until thier status is determined by the competent tribunal.

Commentators on Article 5 of the Geneva Convention have pointed out the inadequacy of the article in its reference to "a competent tribunal".[35] The question arises who must raise the doubt. The best person to do so would be the accused or his counsel, if he has one. It is in this respect that there is need to remember Article 127 of the Convention which provides

> "The High Contracting Parties undertake in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries and in particular to include the study thereof in their programmes of military and if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population."

In Malaysia efforts have been made by the Government, the Malaysian Red Crescent Society and the University of Malaya in the dissemination of knowledge of the Geneva Conventions.

[34] Article 29 of the Hague Regulations of 1907; *Ex Parte Quirin* (1942) 317 U.S. 1, 37.

[35] See Pictet, Commentary on the Geneva Conventions Vol. III (1960) p. 77; and G.I.A.D. Drapper, The Red Cross Conventions (1958) p. 54—55.

In 1971 handbooks entitled "Red Cross and my Country" were produced in English and distributed by the International Committee of the Red Cross. These were translated into Bahasa Malaysia, Chinese and Tamil and distributed to schools. In addition a Teacher's Manual relating to the subject was also produced and distributed.

The Malaysia Red Crescent Society cooperated with the International Red Cross Committee in producing a film "Pax" for the purpose of disseminating knowledge of the Geneva Conventions to the public at large.

Copies of the Soldier's Manual were supplied to the Ministry of Defence for distribution to military colleges and the principal officers in the Armed Forces. The Malaysian Red Crescent Society has also distributed copies of the Red Cross principles to the Armed Forces.

The five Universities in Malaysia and the Teachers Training Colleges have Red Crescent Units which train their members in pre-disaster relief planning and other aspects of humanitarian activities including knowledge of Red Cross principles and the Geneva Conventions. Courses are held throughout Malaysia, and usually one session is held on the role of the Malaysian Red Crescent Society with emphasis on the Geneva Conventions.

Most of the primary and secondary schools in Malaysia have Red Crescent Units. The primary schools have link units and the secondary schools have youth units. The pupils in the primary and secondary schools are trained in first aid and receive lectures on the Geneva Conventions and Red Cross principles.

The Malaysian Red Crescent Society had a publicity campaign in 1975 to reiterate that despite the change in the Society's name and symbol from Red Cross to Red Crescent the Society continues to be a member of the International Committee of the Red Cross and follow the same Red Cross principles and high humanitarian principles and purposes.

The Malaysian Red Crescent Society has formed a National Committee on Humanitarian Law and this Committee has been given the task of drawing up plans for the effective dissemination of humanitarian law in the future.

All members of the Armed Forces when they receive their primary training also receive lectures on the Geneva Conventions and the significance of the three emblems of the Red Cross, the Red Crescent and the Red Lion and Sun and the protection these emblems offer to the medical men, medical equipment and buildings. This is an ongoing programme and members of the Armed Forces in the Army, Navy and Air Force are briefed on their rights as prisoners of war and on the protection and assistance they should give to captured prisoners. They are also briefed on the duties of the International Committee of the Red Cross officials and the assistance given by the International Committee by visits to prisoners of war camps, the tracing of missing persons, aid to prisoners of wars to communicate with their families and the supply of food, clothings and conforts to prisoners of war. Special lectures on the Law of Armed Conflict are also given to senior members of the Armed Forces in the Armed Forces Staff College.

These lectures are given by the Legal Advisors to the Ministry of Defence and by members of the Faculty of Law of the University of Malaya.[36]

The Faculty of Law, University of Malaya, has a course on Human Rights and Humanitarian Law and students are encouraged to read about and write papers on these subjects.

Malaysia hosted the First Asian Seminar on Humanitarian Law in 1978 and her representatives have also taken part in other international seminars and conferences on the subject.

At the XXIIIrd International Conference of the Red Cross in Bucharest in 1977 a resolution was adopted for the dissemination of knowledge of international humanitarian law applicable in armed conflicts and of the fundamental principles of the Red Cross. The resolution calls on National Societies to intensify their effects in collaboration with their Governments, for the dissemination of knowledge of international humanitarian law and of its principles as widely as possible among the population and especially among youth. It is hoped that the efforts already made in Malaysia will be continued and strengthened, seeing that the dissemination of knowledge of international humanitarian law applicable in armed conflicts is one of the vital conditions for its observance. It is well also to remember that the dissemination of Red Cross ideals should not be limited to the Geneva Conventions but should also cover the Red Cross and Red Crescent fundamental principles and be included within the broad concept of man's responsibilities to man, and also associated with the propagation of a spirit of peace and goodwill to mankind.[37]

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[36] See Country Paper by Zakaria bin Mohamed Yatim at The First Asian Seminar on Humanitarian Law, Kuala Lumpur, 1978.

[37] Resolutions and Decisions of the XXIII rd. International Conference of the Red Cross, Bucharest, October 1977, Resolution VII.

TAX AVOIDANCE: THE SCOPE AND EFFECT OF SECTION 140 OF THE INCOME TAX ACT 1967

There is an important distinction between tax evasion and tax avoidance. Tax evasion refers to all those activities deliberately undertaken by a taxpayer to free himself from tax which the law charges upon his income, for example, the falsification of returns, books and accounts or the suppression of some material facts.[1] These schemes are illegal and are subject to very heavy and severe penalties.[2] To constitute evasion there must be an intention to deceive.

Tax avoidance, on the other hand, usually denotes that the taxpayer has arranged his affairs in such a legal manner that he has either reduced his income or that he has no income on which tax is payable. No obligation rests upon a taxpayer to pay a greater tax than is legally due under the taxing Act and a taxpayer is not debarred from entering into a *bona fide* transaction which has the effect of avoiding or reducing liability to tax, provided there is no provision in the law designed to prevent the avoidance or reduction of tax. This is clearly brought out by the following dicta:

> "Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax."[3]

> "No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow — and quite rightly — to take every advantage which is open to it under the taxing statutes for the purposes of depleting the taxpayer's pocket and the taxpayer is, in like manner, entitled to be astute to prevent, as far as he honestly can, the depletion of his means by the Revenue."[4]

The above principles provide a taxpayer with the right and freedom to arrange his activities in a manner he would not otherwise have contemplated.

[1] See s. 114 of the Malaysian Income Tax Act, 1967 (Act 53 Revised — 1971).

[2] *Ibid.*

[3] *Inland Revenue Commissioners* v. *Duke of Westminster* [1963] A.C. 1 at p. 19 *per* Lord Tomlin.

[4] *Ayrshire Pullman Motor Services and D.M. Ritchie* v. *Inland Revenue Commissioners* (1929) 14 T.C. 754 at pp. 763-764 *per* Lord Clyde.