JUDICIAL DECISIONS ON PRISONERS OF WAR QUESTIONS ARISING FROM INDONESIA'S "CONFRONTATION" AGAINST MALAYSIA

The establishment of Malaysia on 16 September 1963[1] (through the merger of the Federation of Malaya, Singapore, and the Borneo States of Sabah and Sarawak) was met with strong protests from Indonesia[2] which maintained that the inhabitants of the Borneo States were being coerced into this "neo-colonialist" arrangement. Indonesian objections to the new Federation were manifested by its policy of "confrontation" against. Malaysia which, initially, signified the severance of diplomatic and economic ties with Malaysia but which later rapidly was intensified to the launching of armed hostilities against Malaysia. These armed attacks included the infiltration into Malaysian territory (by boat or by parachuting from aircraft) of members of the regular armed forces of Indonesia. Not infrequently on these missions, the Indonesian soldiers were accompanied by some Malaysians who had left for Indonesia where they had received military training, uniforms,

24. [1967] 8 W.L.R. 1491, 1500, relying on *dicta* in *R. & H. Hall Ltd.* v. *W.H. Pim (Junior) & Co. Ltd.* (1928) 33 Com. Cas. 324.

25. loc. cit. supra, note 17.

1. See the Malaysia Agreement, 1963 between United Kingdom, Federation of Malaya, North Borneo, Sarawak and Singapore: 2 *International Legal Materials* 816 (1963).

2. Objections were also lodged by the Philippines whose principal fears were that the establishment of Malaysia might seriously jeopardize its claim to territorial sovereignty over Sabah.

cash and arms.[3] Judicial proceedings under the Malaysian Internal Security Act of 1960[4] were commenced against several of these infiltrators captured by Malaysian authorities. This note is to give an account of three decisions where important issues concerning prisoners of war status were raised and decided. The first is a decision of the Judicial Committee of the Privy Council (hereinafter referred to as the Judicial Committee) on appeals from cases decided by the Malaysian Federal Court. The second — which was also decided on appeal by the Judicial Committee — and third cases originated from Singapore (although Singapore separated from Malaysia and became independent on 9 August 1965,[5] the proceedings against the confrontation participants captured in Singapore were not stayed).[6] In this brief account reference will not be made to the various municipal law questions which were also decided in these judicial decisions.

I: *PUBLIC PROSECUTOR* v. *OIE HEE KOI AND ASSOCIATED APPEALS*[7]

These are actually *ten* different appeals[8] from decisions rendered by the Federal Court of Malaysia. All the accused in these cases were Malaysian Chinese either born or settled in Malaysia but whose nationality was not clearly established. They were all captured in Malaysian territory and, at the time of capture, they were armed and in the Company of Indonesian military personnel. They were tried, convicted and sentenced to death for offences under the Internal Security Act, 1960. The relevant sections of *the* legislation are section 57(1) (a) and (b) and section 58:

> 57(1). Any person who without lawful excuse, the onus of proving which shall be on such person, in any security area carries or has in his possession or under his control —
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> (a any firearm without lawful authority therefor; or
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> (b) any ammunition or explosive without lawful authority therefor,
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> shall be guilty of an offence against this Part and shall be punished with death.
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> 58(1). Any person who in any security area consorts with or is found in the company of another person who is carrying or has in his possession or under his control any firearm, ammunition or explosive in contravention of the provisions of section 57, in circumstances which raise a reasonable presumption that he intends, or is about to act, or has recently acted, with such other person in a manner prejudicial to public security or the maintenance of public order shall be guilty of an offence against this part and shall be punished with death or imprisonment for life.

3. It is not certain whether these Malaysian defectors knew of the actual design for their training in Indonesia. In Court they denied such knowledge. But as Lord President Thomson of the Federal Court of Malaysia stated, "The appellant had voluntarily left his own country, against which he admitted a grudge, to go to Indonesia for military training; it was the openly avowed policy of the Republic of Indonesia to crush Malaysia, a policy which was being ruthlessly carried into effect by invasions of Malaysian soil by sea and air. . . . If it was a training exercise with what end was the training being undertaken if not to attack Malaysia?" — *Tan Hwa Law* v. *Public Prosecutor* [1966] 1 M.L.J. 147 at 150.

4. Act No. 18 of 1960.

5. See the Separation of Singapore Agreement, 7 August 1965, between the Governments of Malaysia and Singapore 4 *International Legal Materials* 932 (1966).

6. When Singapore became a constituent State of Malaysia, the Malaysian Internal Security Act, 1960 was extended to Singapore. After Singapore's secession, this legislation continued to have force in Singapore by virtue of Section 13 of the Republic of Singapore Independence Act (Act No. 9 of 1965) which provided that "existing laws" would continue to have force with adaptations and modifications necessitated by Singapore's independent status.

7. [1968] 1 M.L.J. 148; [1968] 1 All E.E. 419.

8. But the reports of only the following Federal Court decisions are available: *Lee Fook Lum* v. *Public Prosecutor*; *Ng Seng Huat & Anor.* v. *Public Prosecutor; Law Kiat Lang* v. *Public Prosecutor; Tan See Boon v. Public Prosecutor; Ho Ming Siang v. Public Prosecutor* (all reported in [1966] 1 M.L.J. at pp. 100, 210, 215, 219 and 252 respectively), Lee Hoo Boon v. Public Prosecutor and *Oie Hee Koi* v. *Public Prosecutor*; *Ooi Wan Yui* v. *Public Prosecutor* ([1966] 2 M.L.J. pp. 167 and 183 respectively).

Except for one case,[9] none of the accused claimed during trial, that they were entitled to treatment as prisoners of war. The Federal Court of Malaysia rejected all appeals save for two cases where the Court held that as the accused there had not been proved to be persons owing allegiance to Malaysia, they were entitled to the protection of the 1949 Geneva Convention Relative to the Treatment of Prisoners.[10] The Public Prosecutor in those two cases, and the unsuccessful appellants in the other cases, appealed to the Judicial Committee. At the Judicial Committee phase, questions concerning prisoner of war status were entertained notwithstanding that they might not have been raised at the trial or Federal Court phases.

Applicability of the Prisoners of War Convention to nationals of, or persons owing allegiance to, the Detaining Power:

The main substantive issue in this case was whether persons who were nationals of the Detaining Power (namely, Malaysia) or who "owed a duty of allegiance" to such a Power and who subsequently went over to the side of the enemy, fought on their behalf and were captured by the Detaining Power, were entitled to the protection of the Convention. The accused claimed that! they were entitled to the protection afforded by the Convention,

The Judicial Committee held that the protection under the Convention did not extend to nationals of the Detaining Power or to persons who, although not nationals, owed a duty of allegiance to such Power.[11] Lord Hodson, delivering the majority judgment of the Judicial Committee, stated "It may indeed be said that allegiance is the governing principle whether based on citizenship or not."[12] This conclusion was reached on the bases of the interpretation of the Convention itself, and of the position in customary international law.

As regards the provisions of the Geneva Convention, the Judicial Committee observed that the Convention did not directly determine the question. Even references to the Protecting Power, although indirectly indicating that the prisoner of war whose interest is to be protected is a national of some State *other* than the captor State, were inconclusive since the International Committee of the Red Cross could also be asked to perform similar functions where no Protecting Power was designated by the belligerent States. Article 4 of the Convention did not exclude nationals of the Detaining Power in its definition of prisoners of war and the Judicial Committee, therefore, felt that Article 4, *prima facie*, included a national of the Detaining Power who was captured by that Power.

However, the Judicial Committee stated that a study of the Convention gave "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."[13] In particular, reference was made to Articles 87 and 100 of the Convention which, in dealing generally with the procedure to be followed by the Court's or authorities of the Detaining Power, referred to the accused as a person "not being a national of the Detaining Power and is not bound to it by any duty of allegiance." This reference to the duty of allegiance, according to the Judicial Committee, suggested the "further inference" that a person who owed this duty to a Detaining Power was not entitled to treatment as a prisoner of war.

9. *Teo Boon Chai* v. *Public Prosecutor* (unreported).

10. Malaysia ratified the Convention in 1962 (to take effect from 24 February 1963) 445 *United Nations Treaty Series*, pp. 316 (1962) and its application internally was secured by the Geneva Conventions Act, 1962 (Act No. 5 of 1962). Indonesia ratified the Convention in 1959 (to take effect from 30 March 1959): 314 *United Nations Treaty Series*, p.332. The text of the Convention is set out in 75 *United Nations Treaty Series*, 235 (1950).

11. The Judicial Committee did not decide whether the appellants were or were not persons who owed such allegiance to Malaysia. Further findings of fact were necessary, it was pointed out, for decision on this point. In one case, however, (*Teo Boon Chai* v. *Public Prosecutor*, unreported) where it was claimed that he was neither an Indonesian citizen nor a Malaysian citizen, the Judicial Committee held (Lord Guest and Sir Garfield Barwick dissenting) that such claim was sufficient to raise a doubt whether he was a prisoner of war and that the lower Court should have treated him as a prisoner of war for the time being and either proceeded with the determination whether he was or was not protected or refrained from continuing the trial in the absence of the notices required by the Convention. In that case only it was found that there was a mistrial and appeal was allowed.

12. [1968] 1 M.L.J. at p.152.

13. *Ibid*. at p.152.

The basis of the decision turning on customary international law was not satisfactorily articulated. The Judicial Committee, on this point, merely stated that "the position was covered *prima facie* by customary international law" and quoted the following passage from Oppenheim's *International Law,* 7th Ed. (Lauterpacht, Ed.) with the observation that the work was published after the adoption of the Geneva Conventions and that it correctly stated the relevant law:

> The privilege 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 are always, 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.[14]

The appellants had also argued that the customary international law position as set out in the passage of Oppenheim had "been in fact abrogated" — by the Geneva Convention and reliance was placed on Articles 82[15] and 85 [16] (dealing with prisoners of war generally). The Judicial Committee in rejecting this argument reiterated its interpretation of the Convention as concerning "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." [17] As regards Article 85 the Judicial Committee felt it had been introduced into the Convention to deal with a limited and particular class of persons accused of violations of the articles of war or of war crimes and that no general change in customary international law was intended.

The American decision *In re Territo*[18] which was the appellants' principal authority for the argument that all captured persons are to be treated alike) was rather summarily discussed on the ground that the authorities reviewed by the Circuit Court of Appeal (Ninth Circulit) actually did not support the contention that the protection extended to nationals of the Detaining Power.

The applicability of domestic penal laws to enemy soldiers captured by the Detaining Power:

This interesting issue arose in an incidental manner. Some of the accused were charged for offences under section 58 of the Internal Security Act (consorting with persons carrying or having possession of arms or explosives in contravention of section 57). The argument of the appellants — and it was a curiously ingenious argument — was that the convictions under section 58 were bad because the only persons with whom they were alleged to have consorted were the Indonesian soldiers "who are not persons to whom section 57 applied." [19] The reasons for their supposition that section 57 "did not apply" to the Indonesians is not discernible from the report. The thrust of the argument here, therefore, was that if section 57 did not apply to the Indonesians, then consorting with them could not have given rise to the offence under section 58.

14. In the Federal Court decision on *Lee Hoo Boon's* case [1966] 2 M.L.J. 167, one of the cases in this appeal, Lord President Thomson said that the Geneva Conventions "are to he read in the light of that [Oppenheim's] statement which after all is a statement of principle by a recognized authority. . ." (p. 169).

15. Article 82 of the Convention reads: "A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.

If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the armed forces of the Detaining Power, such acts shall entail disciplinary punishments only."

16. Article 85 of the Convention reads: "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."

17. [1968] 1 M.L.J. p.153, emphasis added.

18. (1946) Fed. Rep. 2d., 142.

19. [1968] 1 M.L.J. p.154.

Quite surprisingly, the Judicial Committee (Lord Guest and Sir Garfield Barwick dissenting) thought that this submission was well founded:

> 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 ... 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 (sic: 57?) as referring to members of regular forces fighting in enemy country *Members of such forces are not subjected 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 course of carrying out their recognized military duties.[20]

This produced a sharp dissent from Lord Guest and Sir Garfield Barwick:

> 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. . . . Not only do we not find any rule of international law to which the national law ought in comity to conform but it seems 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 the 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 on their trial.[21]

It is submitted that the majority opinion on this point is erroneous and that the dissent is a more accurate and persuasive statement. The doctrine as set out by the majority of the Judicial Committee — that members of invading enemy forces are exempt from domestic criminal laws — does not seem to be supported by any authority. The majority judgment referred to the proper construction of section 57" and to "illegitimate extension of established practice" but, in fact failed to adequately articulate the grounds for construing section 57 in this particular manner.

As the dissenting opinion demonstrated, situations where captured prisoners of war may be tried by the Detaining Power are specifically contemplated by the Geneva Convention itself. Indeed, provisions of the Convention even refer to the pronouncements of death sentences. In the absence of any international criminal law that States are presently compelled to apply within their jurisdiction, the conclusion must be that the trials and penalties envisaged by the Convention must be those according to the Detaining Power's own internal laws. All that the Convention does, as Lord Guest and Sir Garfield Barwick stated, is "to have procedural limitations placed on their trial."

A careful examination of the Convention does not disclose any provision denying the Detaining Power jurisdiction over offences committed by the prisoners of war or exempting prisoners of war from the operation of all the laws of the Detaining Power. It is true that the Convention seeks to place limitations designed for the protection of prisoners of war. Thus "a prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power" (Art. 82) and violation can result in *judicial or* disciplinary proceedings. Article 82 also provides that any law, regulation or order makes punishable an act committed by a prisoner of war (which, if committed by a member of the armed forces of the Detaining Power, would not be punishable) this can entail only disciplinary punishments. Article 84 stipulates that a prisoner of war shall be tried only by a military Court unless the existing laws of the Detaining Power permit civil Courts to try a member of the armed forces of the Detaining Power.

20. *Ibid.* Emphasis added.

21. *Ibid.*, at p.157.

These are nothing more than limitations placed on the general rule, namely, that prisoners of war are subject to the internal laws of the Detaining Power. Article 86 of the Convention specifically refers to the prosecution of prisoners of war "under the laws of the Detaining Power for acts committed prior to capture" and Article 99 states, *inter alia,* that "No prisoner of war may be tried or sentenced to death for an act which is not forbidden by the law of the Detaining Power or by international law" clearly suggests that a prisoner of war may be tried otherwise.

From the report of the case it does not appear that decisions in other countries such as the 1956 Italian case of *Re Tassoli*[22] were cited to the Judicial Committee. In *Re Tassoli,* the Italian Court of Cassation (United Chambers) said:

> According to the laws of war prisoners of war are subject to the penal and other laws of the State which has captured them. These laws apply to all those who are within the territorial boundaries of that State. Indeed, the right to apply criminal sanctions to prisoners of war cannot be doubted because it forms part of the sovereign rights of every State and constitutes a form of application of the general rule of territorial criminal jurisdiction.[23]

From policy perspectives, too, the doctrine projected by the Judicial Committee is undesirable. The majority seemed to think that if enemy invading forces were subject to the penal laws of the country they are invading, "they would be committing crimes from murder downwards in fighting against their enemy in the ordinary course of carrying out their recognized military duties." This may be true (especially where the members of the invading forces engage in acts which are not legitimate acts of war). But there is no reason to assume, as the Judicial Committee did, that this is bad. Certainly one of the goals of international law is to discourage situations of armed conflict between States, and the greater the deterrents against such situations the better it. would be for world public order. It is submitted that the fact that enemy invading forces may be captured and tried for offences according to the laws of the Detaining Power provides one such deterrent.

The principle enunciated by the Judicial Committee, in such broad and sweeping terms ("members of such forces are not subject to domestic criminal law"), if correct; would only encourage a State to more readily contemplate the armed invasion of a neighbouring country if its soldiers who may be captured would be immune from the operation of the penal laws of the State invaded. Such a doctrine is also inimical to the interests of international order in that: volunteers would be less hesitant to participate in an envisaged invasion. Further, it is not inconceivable that such a sweeping doctrine may even cause an invaded State to question the usefulness of capturing enemy prisoners and may find it more convenient to execute them on the battlefield. While this would undoubtedly be a flouting of humanitarian considerations, such a possibility illustrates the unrealistic nature of the Judicial Committee's majority opinion which completely ties the hands of the Detaining Power.

22. Translated report in (1956) 23 *International Law Reports* p. 764. See also the Canadian cases turning on the 1929 Convention: *R.* v. *Shindler et.al.* (Police Court of Alberta, July 16, 1944) (1943-1945) 12 *International Law Reports* p.403..."a prisoner of war in this country, whose country is a signatory to the [1929] Geneva Convention, is subject to the civil laws of this country for crimes committed while escaping or attempting to escape, or after he had escaped from custody." (p. 403). This case disagreed with *R.* v. *Krebs*, (1943-1945) 12 *International Law Reports* p. 407 where a Magistrate's County Court in Ontario held a prisoner of war not criminally responsible for breaking and entering into premises. See also *R.* v. *Broswig* (Court of Appeal p.405 (1943-1945) "The Convention of 1929... is not silent in respect to judicial proceedings against them, as distinguished from disciplinary punishment administered by the military authorities. It is plain from the express provisions that judicial proceedings are contemplated such as may be taken against members of the armed forces of the Detaining Power who offend." (p. 406).

While the wording of the 1949 Convention differs from the 1929 Convention, none of the differences are of such a nature as to justify a neglect of the Canadian decisions.

23. 23 *International Law Reports*, 765 (1956).

II: *OSMAN & ANOR.* v. *PUBLIC PROSECUTOR*[24]

This is also a case decided by the Judicial Committee of the Privy Council on an appeal from the Federal Court of Singapore.[25] Appellants were two Indonesians (who at the time of arrest were not in uniform) who were arrested, charged and convicted for murder of three Singapore civilians. Their death occured as a result of an explosion at a busy commercial building (MacDonald House, Orchard Road) in Singapore. Appellants were alleged to be responsible for the explosion and to have infiltrated into Singapore from Indonesia specifically for such purpose.

In the Federal Court and the Judicial Committee phases of the case, it was assumed that the Geneva Convention applied.[26] The Federal Court had doubts whether they were indeed members of the Indonesian armed forces but was prepared to assume they were. By the time the case went to the Judicial Committee, the Indonesian army had filed affidavits and documents certifying that they were members of the Indonesian armed forces.

The main international law question here was whether the appellants who had shed their military uniforms in order to carry out acts of sabotage would be entitled to the protection of the Geneva Convention on Prisoners of War. The Judicial Committee, affirming the decisions of the Courts in Singapore, held that they were not entitled to treatment as prisoners of war.

The Judicial Committee emphasized that mere membership in the armed forces alone does not give a right to treatment, upon capture, as a prisoner of war. As an illustration, it referred to Articles 29 and 31 of the Hague Regulations concerning the Laws and Customs of War on Land which provided that soldiers who disguised themselves in order to spy are not entitled, upon capture, to prisoner of war status.

After this general statement, the Judicial Committee held that these appellants "were not entitled to be treated as prisoners of war under the Convention when they had landed to commit sabotage and had been dressed in civilian clothes both when they had placed the explosives and lit them and when they were arrested."[27]

It should be observed that there are two elements in this decision of the Judicial Committee: (a) the nature of the activity *i.e.* sabotage and (b) the fact of disguise as civilians. Must! both elements be present, or the existence of either sufficient to deprive the soldier of prisoner of war status? The opinion of the Judicial Committee does clarify this.

If both elements are equally important then the Judicial Committee ought to have dealt with the question whether the actions of the appellants amounted (to acts of sabotage or not. The earlier decision of the Federal Court, it should be pointed put, was partly based on the principle that the placing of explosives in a "non-military building in which civilians are doing work unconnected with any war effort" was "not an act of sabotage but one totally unconnected with the necessities of war."[28] But the Judicial Committee, when invited to decide if the appellants' acts were legitimate acts of war, felt it was not necessary to do so on the highly circuitous ground that "they had forfeited their rights under the Convention by engaging in sabotage in civilian clothes."[29]

The Judicial Committee devoted much attention to the requirement of wearing uniforms. It realized that the Convention did not expressly require members of the armed forces to be wearing uniforms at time of capture in order to qualify

24. [1968] 2 M.L.J. 137.

26. For the Federal Court judgment see [1967] 1 M.L.J. 137.

26. As the Federal Court in making this assumption merely repeated its action in the *Stanislaus Krofan* case (*infra*) this point will be elaborated in the discussion of that case.

27. [1968] 2 M.L.J. p.143.

28. [1967] 1 M.L.J. p.139.

29. [1968] 2 M.L.J. p.143.

for prisoner of war status and that it was only in the cases of "other militias and members of other volunteer corps" that the four following conditions had to be fulfilled:—[30]

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

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

(c) that of carrying arms openly;

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

This difficulty was overcome by the Judicial Committee pointing out that it would be anomalous if the requirement (of fixed distinctive sign recognizable at a distance) did not also apply to members of the armed forces. Heavy reliance was placed on the writings of scholars such as Spaight,[31] Oppenheim,[32] Baxter,[33] and Stone [34] for the proposition that the requirement of uniform was imperative for *any* member of the armed force who seeks prisoner of war status.

For the related proposition that soldiers who are caught in civilian clothing while acting as saboteurs are analogous to spies and forfeit their prisoner of war rights, the Judicial Committee relied, *inter alia,* on the U.K. *Manual of Military Law* (1956) [35] and on the American decision *Ex Parte Quirin*[36] where the United States Supreme Court denied prisoner of war status to several Germans who landed on the U.S. coast and put on civilian clothes for purposes of carrying out sabotage.

III: *STANISLAUS KROFAN & ANOR.* v. *PUBLIC PROSECUTOR*[37]

This case, decided by the Singapore Federal Court is very similar to *Osman's* case. 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 off explosives at certain strategic points in Singapore. They were charged and convicted for offences under section 57(1)(b) of the Internal Security Act. The substantive issue in this case, as in *Osman's* case, was whether members of the armed forces of a party to the conflict who enter enemy territory dressed in civilian clothes to commit acts of sabotage are prisoners of war in the sense of the Geneva Convention.

30. Article 4A(1), (2) and (3) of the Convention read:—
"4A. Prisoners of war, in the sense of the pursuant Convention, are persons belong 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 organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is organized, provided that such militias or volunteer corps, including such organized 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 recognizable 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 recognized by the Detaining Power.

31. *War Rights on Land* (1911).

32. *International Law*, vol. II, 7th Ed. (Lauterpacht, Ed., 1952).

33. "So-called 'unprivileged Belligerency'; Spies, Guerrillas and Saboteurs" (1951) 28 *British Year Book of International Law* p. 235.

34. *Legal Controls of International Conflict* (1954).

35. Paragraph 96 of the Manual provides "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 paragraph 331 provides "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."

36. (1942) 63 S.C. 1; 317 U.S. 1; 87 Law. Ed. 3.

37. [1967] 1 M.L.J. 133.

The Federal Court in its decision (rendered on the same day as its decision on *Osman's* case) 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 purpose of spying or sabotage thereby forfeited his right on capture to be treated as a spy. The Federal Court referred to tithe Hague Regulations, the U.K. *Manual of Military Law,* and the case of *Ex Parte Quirin*[38] to show that prior to the Geneva Convention, prisoner of war status could not be claimed regular combatants who were disguised to act as spies or saboteurs.[39] Turning to the Geneva Convention, the Federal Court felt that the definition in Article 4A(1) had not in any way altered the unprotected position of the "soldier" spy or "soldier" saboteur:—

> 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.[40]

An interesting feature of this case was the question whether the Geneva Convention was applicable in Singapore. The prosecution argued that the Geneva Convention was not part of the law of Singapore. It contended that prior to Singapore's entry into Malaysia, the United Kingdom had not extended the U.K. Geneva Conventions Act, 1967 although provisions did enable such extension Further, it was maintained that when the Federation of Malaya ratified and implemented the Geneva Conventions in 1962, Singapore was then not a State of the Federation; that after Malaysia was established the Geneva Conventions Act), 1962 had never been extended to Singapore (although the Malaysia Act permitted the extension of "any present law" to Singapore or Borneo States).

The Singapore Federal Court declined to decide this important preliminary issue and instead *assumed* that the 1949 Geneva Conventions were applicable at all material times. Wee Chong Jin, C.J. said:—

> To decide it would involve a consideration of many aspects of International Law on which there seems to be no clear consensus of views and a consideration of the nature of multipartite treaties and the extent to which they are or should be applied by domestic courts. It seems to us, in all the circumstances and as it has been raised at a very late stage of the whole proceedings that the proper course for us to adopt would be to decline to decide it and to proceed to deal with this appeal on the assumption that the 1949 Geneva Conventions are applicable to Singapore at all material times.[41]

Was it indeed a "proper course" for the Court to have made such an assumption? It is submitted that it was not. The Constitution of Singapore does not define the relationship between international law and municipal law and does not specify how international law, in general, and treaties, in particular, may be applied by the Courts. If the Constitution provided that all treaties are part of the law of the land, the Court's would have no serious problem. Similarly, where enabling legislation implementing the particular treaty existed. In the *Stanislaus* case there was no enabling legislation: there was a real doubt whether Singapore was a party to the Convention. In such situations the Court, instead of making any assumptions, should have sought clarification from the Executive whether Singapore was a party to this international instrument.[42]

It cannot be over-emphasized that treaty relations of government are as crucial an aspect of its foreign affairs powers as. for instance, the recognition of foreign governments. Courts, in dealing with matters touching on these powers, should be mindful of the international embarassment that may be caused to the government

38. *Supra*, note 36.

39. Chief Justice Wee Chong Jin said (p.136) that this "seems to us to be consistent with reason and necessities of war.... Both seek to harm the enemy by clandestine means by carrying out their hostile operations in circumstances which render it difficult to distinguish them from civilians."

40. [1967] 1 M.L.J. p.136.

41. *Ibid*., at p.135.

42. If the Executive answered in the affirmative then the Court would still have to decide whether it could give effect to the treaty where there was no enabling legislation.

if the Courts took a position contrary to that of the Executive. Suppose in the *Stanislaus* case (where the Court assumed that the Convention applied) the Court had decided that the appellants *were* entitled to prisoner of war status The Government of Singapore then would have had to observe the provisions of a treaty which it had not chosen to ratify!

Precedent does exist in Singapore whereby Courts consider the views of the government in such matters. In *In re Westerling*[43] (proceedings for extradition commenced by Indonesia) one of the issues was whether there was any extradition treaty between United Kingdom and Indonesia. The Attorney-General appeared and tendered the following statement:—

> I have to inform the Court on the authority of the Secretary of State for Foreign Affairs that [Indonesia] has succeeded to the rights and obligations of the Kingdom of Netherlands under the Anglo-Netherlands Extradition Treaty of 1898 in respect of Indonesia and that the said Treaty now applies between His Majesty's Government in the United Kingdom and [Indonesia].

The Attorney-General also contended that the question whether the Crown is in Treaty relations with a foreign State is a matter on which the Court should seek guidance from the appropriate department of the Executive whose reply should not only be evidence of the fact but conclusive evidence. The Court *held* that whenever the treaty relations of the Crown with a foreign State are in issue, the Court should seek guidance from the Executive whose views must be taken as conclusive evidence.

This is a sound doctrine and one is at a loss to understand why the attention of the Court was not drawn to this case.

S. JAYAKUMAR

43. [1951] M.L.J. 38.