# Malaysia, Public Prosecutor v. Oie Hee Koi

**N.B. As per the disclaimer [1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: Levie, H.S. (ed.), *International Law Studies: Documents on Prisoners of War*, Naval War College, R.I., Naval War College Press, vol. 60, Document No. 155, 1979, pp. 737-744]

## PUBLIC PROSECUTOR V. OIE HEE KOI (AND ASSOCIATED APPEALS) Privy Council, December 4, 1967

**1 All E.R.419 [1968], A.C. 829 [1968], 42 ILR 441 (1971)**

[...]

LORD HODSON: In these associated appeals the main question is whether the accused were entitled to be treated as protected prisoners of war by virtue of the Geneva Conventions Act, 1962, to which the Geneva Conventions of 1949 are scheduled.

The accused are so-called Chinese Malays either born or settled in Malaysia but in no case was it shown whether or not they were of Malaysian nationality. [...]

They were captured during the Indonesian confrontation campaign. All but two were dropped in Malaysia by parachute as members of an armed force of paratroopers under the command of Indonesian Air Force officers. The main party was dropped in Johore wearing camouflage uniform. Each man carried a fire-arm, ammunition, two hand grenades, food rations and other military equipment. Of the main party thirty-four out of forty-eight were Indonesian soldiers and fourteen Chinese Malays which included twelve of the accused. One was dropped from a different plane similarly equipped. The remaining two accused landed later by sea and were captured and tried. One of these likewise claimed the protection of the Geneva Convention.

All the accused were convicted of offences under the Internal Security Act, 1960 of the Federation of Malaya and sentenced to death. [...]

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All the accused appealed against their convictions [...] and their appeals were dismissed by the Federal Court of Malaysia save in two cases namely that of Oie Hee Koi (Appeal No. 16 of 1967) and that of Ooi Wan Yui (Appeal No. 17 of 1967) in both of which the appeals were allowed on the ground that the accused were prisoners of war within the meaning of the Geneva Conventions Act, 1962, of the Federation of Malaya (herein referred to as “the Act of 1962”) and as such were entitled to protection under the Geneva Convention relative

to the treatment of prisoners of war (Sch. 3 to the Act of 1962).

In these two cases the public prosecutor appeals by special leave from the decision of the Federal Court. In the remaining cases the accused appeal by special leave against the decisions of the Federal Court upholding their convictions.

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[...]

Article 5 [of the 1949 Convention] 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 art. 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." [...]

Article 5 of the Convention is directed to a person of the kind described in art. 4 about whom "a doubt arises" whether he belongs to any of the categories enumerated in art. 4. By virtue of art. 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". [...]

In the two cases in which the public prosecutor is appellant that is to say that of Oie Hee Koi and that of Ooi Wan Yui, [...], 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, [...] no point had been raised at the trial, and therefore no "doubt arose" so as to bring s. 4 into operation.

Their lordships are of the opinion that on the hearing of their appeals by the Federal Court no burden lay on 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" art. 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 *R. v. Guiseppe*. 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.

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[...]

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 proceedings without the notices required by s. 4 [of the Act of 1962] 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 s. 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 the record that the accused's counsel claimed that his client was not a Malaysian citizen, and not an Indonesian citizen either, and 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 that he did not do so. The claim, having been 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 or 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.

In the remaining cases there was no mistrial by reason of the absence of the notices required by s. 4. [...]

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Their lordships accordingly reported to the Head of Malaysia that the [Holding] appeals in Nos. 16 and 17 of 1967 be allowed; [...] that the appeal in case No. 15 be allowed. [...]

## Discussion

1. According to IHL, must the accused affirmatively claim prisoner-of-war status and the protection of the Conventions in order to be accorded them? (GC III, Art. 5 [2]) If so, in all cases? Only in those where no "doubt arose"?
2. a. Which standard should be used to assess whether "doubt arose" or perhaps should have arisen to a court's attention? Should not the fact of membership in the enemy armed forces always raise the doubt to which Art. 5(2) of Convention III refers? Or even lead to the presumption of prisoner-of-war status?
   b. Do you agree that the facts of this case raise no doubt as to the status of the accused? Particularly the circumstances of their capture?

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