Part 1

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**: *Law Reports*, vol. 1, 1969, Appeal Cases, pp. 430-455 (P.C.)]

HOUSE OF LORDS
[PRIVY COUNCIL]
OSMAN BIN HAJI MOHAMED ALI AND ANOTHER
APPELLANTS
AND

THE PUBLIC PROSECUTOR
RESPONDENT
ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

[...]

On March 10, 1965, two girl secretaries at a bank in Singapore were killed by an explosion caused by a bag containing 25lb. of nitroglycerine, placed by the two appellants on the stairs of the building. The appellants were not wearing uniform and they had no identification papers nor were they wearing uniform when arrested. They were charged under the Penal Code with the murder of the two girl secretaries and of another person injured by the explosion who died later, and tried in the High Court of Singapore [...]. The appellants claimed to be members of the Indonesian armed forces and entitled to the protection of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949. The trial judge ruled that they were not entitled to the status of prisoners of war and convicted them. [...]

[It was argued for the appellants:]

Thirdly, the appellants were prisoners of war within the Geneva Convention and were accordingly entitled to the protection of the Convention, and as there was no evidence that the notification required by article 104 of the Geneva Convention and section 4 of the Geneva Convention Act, 1962, had been given there was a mistrial and the appellants' convictions ought to be quashed. The propositions in support of this submission are:

A. [...] This appeal must proceed on the basis that the Convention applied to Singapore [at that time part of Malaysia] and that at the relevant time there was a state of armed conflict between Indonesia and Malaysia.

B. If a “doubt” about status arises, an inquiry into status as distinct from a trial can be held without service of a notice. [...] Unless status is determined or notice is given, the trial cannot proceed: article 5 of the Convention. A “doubt” as to status arose on the very day the appellants were arrested and claimed to be members of the Indonesian armed forces. A “doubt” arises within the meaning of article 5 where there is an armed conflict and the accused on capture claim to be members of the armed forces. There may be circumstances which make it obvious that the claim to status is obviously untrue but the circumstances of this case were sufficient to raise a “doubt” that the appellants may be able to obtain the protection of the Convention. There was nothing in the circumstances which made it obvious that the appellants were not members of the armed forces of Indonesia. Article 5 is a holding provision, and the court will give it a wider interpretation. It is wrong to say that the “doubt” did not arise until counsel claimed the protection of the Convention. Accordingly, there was a mistrial as no notice was served and the status of the appellants was not determined. “A belligerent act” within article 5 is any act in the course of war, lawful or unlawful. It is not confined to only a legitimate act of war. It cannot be decided summarily by the authority on the spot. “Status” within article 5 would depend on questions which only a competent tribunal could determine. In any case a “doubt” did arise when the protection of the Convention was claimed by counsel at the commencement of the trial, and the trial court rightly held an inquiry as to status and found the appellants not entitled to the protection of the Convention. That finding on the preliminary issue has been proved to be wrong; accordingly the trial court was not justified in proceeding with the trial without notices being served. By reason of the new evidence only now available and which was not available at the time of the trial, there should be a new trial. If the trial was not adjourned under article 104, then it was a mistrial and the appellants’ convictions cannot be allowed to stand.

C. Under article 4A (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 are in the category of “prisoners of war”, and this applies equally to members of the armed forces captured out of uniform. The requirements of article 4A (2) are not to be read by implication into article 4A (1). The absence of a distinctive sign does not prevent

> members of the armed forces not in uniform from claiming the protection of the Convention. Under the Convention the identification mark is limited to the possession of an identity card. The questions contemplated by article 17 were never put to the appellants. Article 85 of the Convention applies to prisoners of war convicted of war crimes, so that they are entitled to the status and protection of the Convention even after conviction of a war crime; a fortiori they are entitled to that protection before conviction and while suspected and accused. [...]

Fourthly, sabotage is a mere species of war crime. Saboteurs are not to be equated with spies. A member of the armed forces in civilian clothes is to be treated as a war criminal, if his acts are to be regarded as unlawful. A spy is one who is secretly gathering information in disguise and is in a special position and has no protection on capture, whereas a member of the armed forces out of uniform and civilian clothes is liable to be tried for a hostile act destroying life or property as having committed a crime contrary to the laws of war and not contrary to domestic law. The Convention of 1949 in contrast to the Convention of 1929 expressly gives protection and status of prisoners of war to members of guerrilla forces. The tendency of law is to extend the protection of the Convention. It is a branch of law developing very rapidly. There is no distinction between an attack on military buildings and on civilian buildings. Indiscriminate bombing does not involve breach of the laws of war. It is impossible to find any principle by which an attack on civilian buildings can now be regarded as a breach of the laws of war in conditions of modern warfare. Unprivileged belligerency is something that is done which is not permitted by the rules of war; but treatment as privileged, or unprivileged, belligerent cannot be at the pleasure of the captor. [...]

[It was argued for the respondent:]

First, assuming that the appellants were members of the Indonesian armed forces, they had forfeited any right to treatment as prisoners of war under the protection of the Geneva Convention in that (a) they divested themselves of their uniforms; (b) they assumed civilian

clothing; (c) they attacked a civilian target; and (d) they caused death and injury to peaceful civilians. The authorities on the Convention support the following propositions: (1) Members of the armed forces who divest themselves of their uniform for hostile purposes are not entitled to the status of “prisoner of war” under article 4A of the Convention or otherwise. (2) Spies and saboteurs out of uniform are within the above category and so are not entitled to the status of “prisoner of war” on capture. (3) Spies and saboteurs out of uniform are not guilty of war crimes properly so called by being out of uniform for hostile purposes. (4) Spies and saboteurs out of uniform are subject to trial and punishment under the municipal law of the captor state. (5) The killing of peaceful civilians and attacking non-military buildings is contrary to the laws and customs of war. (6) Indiscriminate bombing and the use of V1 and V2 weapons is contrary to the laws and customs of war. (7) Saboteurs may be (a) ordinary civilian volunteers, (b) members of militias or volunteer corps organisations engaged in sabotage, and (c) members of armed forces under orders to commit sabotage. (8) The conditions prerequisite in article 4A (2) are also prerequisite in article 4A (1) by necessary implication. [...]

Part 2

The judgement of their Lordships was delivered by VISCOUNT DILHORNE.

On October 20, 1965, the appellants were convicted in the High Court of Singapore under Penal Code of the murder of three civilians and sentenced to death. Their appeals to the Federal Court of Malaysia were dismissed on October 5, 1966, and they now appeal by special leave. [...]

[T]he appellants were rescued from the sea some distance from Singapore by a bumboat man. He saw them in the sea clinging to a plank. [...] He swore that neither of the appellants was wearing uniform and that one of them was bare bodied and wearing a pair of darkish

trousers and the other a sports shirt and pair of long trousers. [...]

At 2.35 p.m. the same day the first appellant was charged with the murder of the three persons killed by the explosion. He was again cautioned and he then made a statement saying that he had come to Singapore at 11 a.m. on March 10, that he had gone with the second appellant to look for a target, than he and the second appellant had placed “two bundles of explosives on stairs before reaching the first floor”, that the second appellant had lit the fuse and that after that they had left and taken a bus. [...]

At 6.15 p.m., the first appellant had an interview with Mr. Yeo, then Fourth Magistrate. He told him that he was a member of the Indonesian Army and that he had come to give the magistrate information with regard to the duties he had been instructed to perform by his superiors. [...]

At the opening of the trial counsel for the appellants asserted that they were both members of the Indonesian armed forces and that they were entitled to the protection of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949. In 1962 the Geneva Conventions Act was passed in the Federation of Malaya to give effect to this, among other, Conventions.

Section 4 (1) of this Act provides, inter alia, that the court before which a protected prisoner of war is brought up for trial for any offence shall not proceed with the trial until it is proved to the satisfaction of the court that a notice giving the full name and description of the accused and other details about him including the offence with which he is charged and the court before which the trial is to take place and the time and place of trial has been served not less than three weeks previously on the protecting power and on the accused and the prisoner’s representative.

In support of this contention the first appellant gave evidence that he was a member of the Indonesian armed forces, a corporal in the “Korps Kommando Operasi” regular force. He swore that when they has been rescued from the sea, he and the second appellant had been wearing uniform. He said that his and the second appellant’s identity cards had been in plastic bags which were lost when their sampan sank. The second appellant also gave evidence that he was a member of the “Korps Kommando Operasi” and that he was wearing military uniform when he was rescued. He also said that he had not been allowed by his commander to wear his identity disk. After hearing evidence from the bumboat man and the other witnesses who had seen the appellants shortly after their rescue as to the appellants’ clothing, the learned judge ruled that the appellants were not entitled to the status of prisoners of war. He said that the evidence was overwhelming that when they were rescued they were not wearing uniform. He also found that they first claimed to be fishermen while later on one claimed to be a farmer. [...]

He added that if they were members of the Indonesian armed forces, they were not in his opinion entitled to the status of prisoners of war.

“In my view” he said “members of enemy armed forces who are combatants and who come here with the assumption of the semblance of peaceful pursuits divesting themselves of the character or appearance of soldiers and are captured, such persons are not entitled to the privileges of prisoners of war.”

After hearing of the appeal by the Federal Court affidavits were filed on behalf of the appellants sworn by two officers of the Indonesian Army, stating that the appellants had since March, 1965, been members of the Indonesian armed forces and serving in units under the “Kommando Mandala Siaga” and documents purporting to be their personal military records were produced. [...]

Mr. Le Quesne also argued that the appellants were prisoners of war within the Geneva Convention and that the requirements of that Convention were not complied with, with the result that there was a mistrial.

Article 2 of the Convention provides that it shall apply to all cases of declared war or of any 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. At the commencement of the trial Crown Counsel submitted that there was no state of war or armed conflict between Indonesia and Malaysia at the time but when Chua J. said that in his view there was a state of armed conflict, Crown counsel did not pursue the matter. [...]

The appeal was therefore heard on the basis that the Convention applied to Singapore and that at the time there was a state of armed conflict between Indonesia and Malaysia.

The issue to be determined is whether in the circumstances of this case, the appellants were entitled to the protection of the Convention. The view of Chua J. on this has already been stated. The Federal Court held 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:

> "It seems to us clear 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 on capture to be treated as a prisoner of war."

They consequently held that the appellants were not prisoners of war within the meaning of the Convention.

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 the army, but also to militia and volunteer corps fulfilling all the following conditions: (1) They must be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive sign recognisable at a distance; (3) To carry arms openly; and (4) They must 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’.”

Part 3

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 in the “Commentary on the Geneva Convention” published by the Red Cross in 1960 [The Geneva Conventions, Commentary, published under the direction of Jean S. Pictet, III: The Geneva Convention Relative to the Treatment of Prisoners of War, ICRC; Geneva, 1958; available on http://www.icrc.org/ihl [2]] at p. 46;

> “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 follows:

"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. [...]

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-pargraphs (1), (2) and (3). They read as follows:

"A. 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 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; (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* at p. 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 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 ed. (1952), volume II, at p. 259, calls them “the organised armed forces.” In *War Rights on Land* Mr. Spaight says, at p. 56, in relation to article 1 of the Regulations: “The four conditions must be united, to secure recognition of belligerent status. “Pictet in the Commentary on the Geneva Convention says, at p. 48: “The qualification of belligerent is subject to these four conditions being fulfilled,” and, at p. 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 hierarchy and they know and respect the laws and customs of war.”

In relation to troops landed behind enemy lines, Professor Lauterpacht in Oppenheim's International Law says, at p. 259, 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 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.

Part 4

In paragraph 96 of the Manual of Military Law 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 [See Case No. 99, United States, Ex Parte Quirin et al. [3]], the United States Supreme Court had to consider motions for leave to file petitions for writs of habeas corpus. [Footnote 2 reads: (1942) 317 U.S. 1.] 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: [footnote 3 reads: (1942) 317 U.S. 1, 31.]

> “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: [footnote 4 reads: Ibid, 37.]

> “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 the 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 civilian clothes both when they had placed the explosives and lit them and when they were arrested. [...]

Mr. Le Quesne further contended that the appellants' act in placing the explosives was a legitimate act of war and that they could not therefore be tried for murder. The Federal Court in rejecting the appellants' plea, appear to have done so partly on the ground that placing the explosives in MacDonald House "a non-military building in which civilians are doing work unconnected with any war effort" was not a legitimate act of war. "The immunity of non-combatants from direct attack is one of the fundamental rules of the International Law of war" and "Non-combatants are not, under existing International Law, a legitimate military objective" (Professor Lauterpacht in Oppenheim, at p. 524 and 525).

As, if they were members of the Indonesian armed forces, in their Lordships' opinion, they forfeited their right under the Convention by engaging in sabotage in civilian clothes, it is not necessary to consider whether they also forfeited them by breach of the laws and customs of war by their attack on a non-military building in which there were civilians. Having forfeited their rights, there was in their lordships' view no room for the application of article 5 of the Convention and, not being entitled to protection under the Convention, the appellants' conviction for murder committed by them when dressed as civilians and within the jurisprudence of Singapore cannot be invalidated.

For these reasons, their Lordships were of the opinion that the appeal should be dismissed. [...]

Discussion

1. Did an international armed conflict exist between Indonesia and the Federation of Malaysia (to which Singapore then belonged)? Was the sole fact that members of Indonesian armed forces carried out attacks in Singapore, under orders of their superiors, sufficient to make IHL applicable? (GC I-IV, Art. 2 [4])
2. a. Under the Geneva and Hague Conventions, must members of regular armed forces permanently distinguish themselves from the civilian population? May they be punished for failing to do so? Must they be punished for failing to do so? Do they lose combatant status if they fail to do so? How does the situation change with the applicability of Protocol I? (HR, Art. 1 [5]; GC III, Art. 4(A) [6]; P I, Arts 44(3)-(4) [7] and 85 [8]; CIHL, Rule 106 [9])
   b. May a member of regular armed forces attack civilian targets? May such individuals be punished if they do? Must they be punished if they do? Do they lose combatant status if they do so? (HR, Arts 23(g) [10], 25 [11]and 27 [12]; GC III, Art. 85 [13]; GC IV, Arts 146 [14]-147 [15]; P I, Arts 44(2) [7], 48 [16], 51 [17], 52 [18], 57 [19]and 85 [8])
   c. If the appellants had worn uniforms at the time of attack, could they have been sentenced? In what way would their legal situation have been different?
   d. Could this decision have been rendered if Protocol I had been applicable? Would the result have been different? Which part of the Court's reasoning would have been different? (PI, Art. 44 [7])
3. Should the appellants have benefited from the presumption provided for in Art. 5(2) of Convention III? What would the consequence of that presumption have been for their trial? Was Art. 104 of Convention III applicable?

---

[6] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=2F681B08868538C2C12563CD0051
[7] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=524284F49042D4C8C12563CD0051
[8] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=73D05A98B6CEB566C12563CD005
[9] https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule106
[10] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=61CDD9E446504870C12563CD005
[11] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/195-200035?OpenDocument
[12] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/195-200037?OpenDocument
[13] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=9EDE675C58F1125DC12563CD005
[14] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6F96EE4C7D1E72CAC12563CD00
[15] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/380-600169?OpenDocument
[16] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=8A9E7E14C63C7F30C12563CD005
[17] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=4BEBD9920AE0AEAEC12563CD0
[18] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750067?OpenDocument
[19] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=50FB5579FB098FAAC12563CD005