The majority judgment of their Lordships (Lord Hodson, Lord Wilberforce and Sir Douglas Menzies) was delivered by **Lord Hudson.**

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. Most carried blue identity cards issued pursuant to the National Registration Regulations which, by regulation 5 (2) (a), provide for the issue of "blue bordered cards with blue printing to citizens of the Federation of Malaya." One carried a red card appropriate to a non-citizen.

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 34 out of 48 were Indonesian soldiers and 14 Chinese Malays which included 12 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. Section 57 deals with offences relating to fire-arms, ammunition and explosives and so far as material reads as follows:

> "(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 - (a) any fire-arm without lawful authority therefor; or (b) any ammunition or explosive without lawful authority therefor, shall be guilty of an offence against this Part and shall be punished with death ... (3) A person shall be deemed to have lawful excuse for the purposes of this section only if he proves - (a) that he acquired such fire-arm, ammunition or explosive in a lawful manner and for a lawful purpose; and (b) that he has not at any time while carrying or having in his possession or under his control such fire-arms, ammunition or explosive, acted in a manner prejudicial to public security or the maintenance of public order ..."

By section 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 fire-arm, 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 with imprisonment for life."

Proclamation of Security Areas is dealt with in section 47 (1) which so far as material reads as follows:

> "If in the opinion of the Yang di-Pertuan Agong public security in any area in the Federation is seriously disturbed or threatened by reason of any action taken or threatened by any substantial body of persons, whether inside or outside the Federation, to cause or to cause a substantial number of citizens to fear organised violence against persons or property, he may, if he considers it to be necessary for the purpose of suppressing such organised violence, proclaim such area as a security area for the purposes of this Part ... (3) A proclamation made under sub-section (1) shall be published in such manner as the Minister thinks necessary for bringing it to the notice of all persons who in his opinion ought to have notice thereof an shall have effect as soon as such notice has been given, without publication in the Gazette."

All the accused appealed against their convictions upon charges laid under sections 57 and 58 of the Act and their appeals were dimissed 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 and as such were entitled to protection under the Geneva Convention relative to the treatment of prisoners of war (Schedule 3 to the Act).

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.

The Act itself provides as far as material as follows:

> "Section 2. In this Act, unless the context otherwise requires- .. 'protected prisoner of war' means a person protected by the Convention set out in the Third Schedule; 'the protecting power,' in relation to a protected prisoner of war or a protected internee, means the power or organisation which is carrying out, in the interests of the power of which he is a national, or of whose forces he is, or was at any material time, a member, the duties assigned to protecting powers under the Convention set out in the Third or, as the case may be, Fourth Schedule; ..."

Section 4 (1):

> "The court before which - (a) 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 containing the particulars mentioned in subsection (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 prisoner's representative."

Section 4 (2) sets out the particulars required which include the name and full description of the accused, the offence with which he is charged and the court time and place appointed for trial.

Their Lordships 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 a 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 ed. (p.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 Lordships 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 that 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 (Schedule 3 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.

Article 4A commences: "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:" There 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.

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 question 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 inquiry into status could be directed without such a notice, as section 4 of the Act does not apply to such an inquiry. 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 Oie 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 decisions 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*, [1943] S.A.K.R. (T.P.D.) 139. 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 in Oppenheim's International Law, 7th ed. (1952), vol. 2, p. 268, concerning the armed forces of belligerents. This passage cited by Thomson L.P. in the Federal Court 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 August 12, 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. Article 87 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 the 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*, hi 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 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 or of war crimes (see *Yamashita* v. U.S., (1946) 327 U.S 1.) 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*, (1946) 156 U.S.Fed.R (2d) 142, a decision of the Circuit Court of Appeal (Ninth Circuit) dated June 8, 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 was 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 contention 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 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 *Joyce v. Director of Public Prosecutions* , [1946] A.C. 347, 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 L.C., ibid. 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, [1946] A.C. 347, namely, *Rex v. Neumann,* (1949) 3 S.A.L.R (T.P.D.) 1238. 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. *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 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 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 course 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.

Save in two cases to which their Lordships will now turn no other points were argued in support of these accused persons.

These two cases may be dealt with briefly.

In the case of *Lee Fook Lum* v. *Public Prosecutor*, No. 16 of 1966, the accused was charged that:

> "between dawn on August 17, 1964, and 9.10 a.m., August 18, 1964, in the security area as proclaimed by the Yan Di-Pertuan Agong vide Federal Legal Notification 245 of August 17, 1964, namely Kampong Parit Jawa, in the district of Pontian, in the State of Johore, without lawful excuse, carried ammunition to wit, one hand grenade, without lawful authority, and that you thereby committed an offence punishable under sub-section (1) of section 57 of the Internal Security Act, 1960."

Reliance was placed on the Geneva Convention which has already been discussed. It was further argued that under section 80 of the Act the consent of the Public Prosecutor to the prosecution should have been and was not obtained. The answer to this objection is that the Public Prosecutor was himself the prosecutor and his consent is implicit in his action. The provision in section 80 requiring consent is applicable where prosecutions take place, e.g., before a Sessions Court, and the Public Prosecutor is not the actual prosecutor.

Next it was argued that under section 47 of the Internal Security Act proclamation of a security area was a prerequisite for the commission of the offence charged and that there was no evidence that such proclamation had been published otherwise than in the Gazette dated September 17, 1964, the day of the alleged commission

of the offence. This argument falls to the ground since the proclamation takes effect from the beginning of the day of publication.

The main argument for the accused was that he had established that he had lawful excuse for carrying the hand grenade the subject of the charge and that the courts had misapprehended the evidence. The gist of the defence, which was never established by the evidence, was that he had at all material times lawful excuse within the meaning of section 57 (3) of the Internal Security Act in that he intended all along to surrender. The trial judge did use the words "all along" but in its context it did not extend to the time when the accused acquired the grenade but only to a later time when he did according to his evidence form the intention of surrendering. This argument also fails.

The last case is that of *Lee A Ba* v. *Public Prosecutor* (No. 36 of 1966).

The identity card of the accused describes him as a Malayan citizen and he was charged with having in his possession in a security area without lawful excuse ammunition to wit, two hand grenade detonators, without lawful authority, contrary to section 57 (1) *(b)* of the Internal Security Act.

The accused relied on the Geneva Convention and in addition argued that the detonators did not come within the definition of ammunition in section 2 of the above Act.

Section 2 so far as material reads as follows:

> "'ammunition' means ammunition for any fire-arm as hereafter defined and includes grenades, bombs and other like missiles whether capable of use with such a fire-arm or not ... 'explosive' - means ... *(b)* includes ... detonators ..."

Their Lordships accept the submission that the detonators were explosives according to definition and not ammunition but are of opinion that the error in nomenclature is of no significance. The Criminal Procedure Code provides by section 152 (1) that any charge under this Code shall state the offence with which the accused is charged. Section 153 (1) provides for sufficient notice to be given to the accused of the matter with which he is charge.

These provisions were complied with. Section 156 provides that no error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or these particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission. It was not contended that the accused was in fact misled and their Lordships are of opinion that error in stating the offence was immaterial and there is no substance in the defence based on the misdescription of detonators as "ammunition" instead of "explosives."

This accused also relied on the absence of consent by the Public Prosecutor. The answer to this is the same as in the previous case.

Their Lordships accordingly reported to the Head of Malaysia that the appeals in Nos. 16 and 17 of 1967 be allowed so as to restore the convictions on the first and second charges in No. 16 and the second and third charges of No. 17, and to quash the convictions on the third charge in No. 16 and the first charge in No. 17; that the appeal in case No. 15 be allowed, all the convictions therein be quashed and the case remitted for re-trial on the first and second charges; that the appeals in all the remaining cases be dismissed save and except that the convictions on the charges based on section 58 of the Internal Security Act be quashed in every case.

Their Lordships also reported that the costs of the respondents in appeals No. 16 and 17 should be paid by the appellant as agreed between the parties. The costs of the appellants in the remaining appeals are to be taxed on the pauper scale.

Lord Guest *and* **Sir Garfield Barwick** gave the following dissenting judgment.

These appeals arise out of what has been described as the Indonesian confrontation of Malaysia. The charges against the accused were breaches of various provisions of the Internal Security Act No. 18/1960. The main question raised in all the appeals was whether the accused were entitled as prisoners of war to the protection of the Geneva Convention, dated August 12, 1949, as applied to Malaysia by the Geneva Conventions Act, 1962,. In all cases the 12 accused were convicted by the trial judge and sentenced to death. In two cases, No. 16 of 1967 Oie Hee Koi and No. 17 of 1967 Ooi Wan Yui, alias Wong Kam Chin, the convictions and sentences were quashed by the Federal Court of Malaysia. In the remaining cases the appeals of the accused were dismissed and the convictions sustained. Appeals have been taken by the prosecutor in case Nos. 16 and 17 and in the remaining cases the accused have appealed to the board.

Upon the main question the members of the board are unanimous that in all the cases except No. 15 of 1967 Teo Boon Chai, alias Tey Ah Sin, the accused were not entitled to the protection of the Geneva Convention. In order to appreciate the point on which our dissent is entered, it is necessary to describe more fully the arguments upon the question of the applicability of the Geneva Convention. In reply to the claim that the accused were entitled to the protection of the Geneva Convention the prosecution argued that the Convention did not apply to Malaysian nationals or persons owing allegiance to Malaysia. This argument was countered by the accused

saying that is was irrelevant whether they were Malaysian nationals or persons owing allegiance to Malaysia as both classes of persons were protected by the Convention. The argument for the prosecution has been sustained by the unanimous judgment of the board for the reasons there given. An incidental question was raised in the course of this argument as to whether the onus was on the prosecution to prove that the accused were Malaysian nationals or persons owing allegiance to Malaysia or whether the onus was on the accused to bring themselves within the protection of the Convention. Again the unanimous advice of the board, as we understand it, is that when the point was raised as to prisoner of war status the onus was on the accused to prove that they were within the Convention. We find ourselves in complete agreement with the board's advice on these matters and with the relevant reasons given. We are also in agreement with the board's advice in connection with the additional matters raised in Lee Fook Lum (No. 16 of 1966) and Lee A Ba (No. 36 of 1966).

It is on the case of No. 15 of 1967 Teo Boon Chai, alias Tey Ah Sin, that we find ourselves in disagreement with the advice of the majority of the board. They have advised the quashing of the conviction in this case and that the case should be sent back for retrial. The reasons are that although in the remaining cases no question of prisoner of war status was raised at the trial, in this case such a question did arise when the accused pleaded to the charges and the following took place as recorded at the trial:

> "*Chan*: Accused is not a Malaysian citizen and not an Indonesian citizen either. He should therefore be treated as a prisoner-of-war under the Geneva Convention.
>
> *Ajaib Singh*: Court has jurisdiction as accused was born and bred in this country. Unless there is proof of his being a national of any country other than Malaya he cannot take advantage of any Conventional Treaty.
>
> *Court*: I rule that the court has jurisdiction to try accused."

Chan was the advocate appearing for the accused. No further reference was made to the matter and no evidence was led for the accused to justify this purported challenge of the jurisdiction, nor was any other objection taken to the trial proceeding.

Section 4 (1) of the Geneva Convention Act No. 5 of 1962 provides as follows:

> "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 prisoner's representative."

By section 2 a protected prisoner of war is a person protected by the Convention, i.e., the Geneva Convention set out in Schedule 3. Article 4A of the Convention defines the various categories of prisoners of war and article 5 is in the following terms:

> "The present Convention shall apply to the persons referred to in article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belongs 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."

It is said that when the accused claimed through his advocate the protection of the Convention, there arose a doubt within the meaning of article 5 as to his status and that the court should then have adjourned the trial until a notice had been served on the protecting power under section 4 (1) of the Act of 1962 and that the subsequent trial was a nullity. With respect to the opinion of the majority, we cannot follow this argument. Although the draftsman of section 4 of the Geneva Conventions Act probably contemplated, as the language of the section suggests, that the status of the accused in relation to the Convention will have been determined by some competent tribunal before he is brought up for trial, section 4 must, in our opinion, be construed as apt to include the case where an accused is brought to trial before that status is determined and to empower the court to determine that status. Thus, although by definition "protected prisoner of war" means a person protected by the Convention and article 5 requires that captured enemies enjoy the protection of the Convention until their status is determined, in our opinion, the obligation upon the court under section 4 to adjourn the proceedings does not arise until that status is determined; and, if not already determined by some other tribunal, it does not arise until it is determined by the court itself. The accused, in our opinion, will be given the protection of the Convention for which article 5 provides, if having claimed and evidenced his status before the court, the question whether or not he is a protected prisoner of war is determined by the court before any other step is taken in his trial. Here, the accused in reality did not raise the appropriate claim. In any case he did not press the claim he did make and certainly did not evidence his status as a prisoner of war. The "doubt" which would have to arise under article 5 would be whether the person belonged to the categories mentioned in Article 4A. Having regard to all that took place at the time, the point taken by the accused at the trial in substance was that because he was not a Malaysian citizen or an Indonesian citizen the court had no jurisdiction to try him. This was really an assertion that the Convention applied to those within Malaysian allegiance, though not to Malaysian nationals (citizens). This

had nothing to do with the question whether the accused was a prisoner of war within one of the categories of article 4. The point taken by the accused's advocate was really the contrary of what the board has unanimously decided, namely, that the Convention applied to all prisoners of war who being Malaysian nationals merely owed allegiance to Malaysia. Moreover, the point taken by the accused's advocate was, in our view, misconceived. There was no question as to the jurisdiction of the court; the only available plea was whether the court should adjourn under section 4 (1) of the 1962 Act. This point was never taken by the accused a the trial. For these reasons it seems to us that the accused was in precisely the same position as the other accused and the same reasons would apply for dismissing his appeal as in these cases. The real point in this case on the Geneva Convention was not taken till the hearing before the Federal Court.

In substance our disagreement with the majority judgment is that case No. 15 of 1967 is on all fours with the remaining cases. The Federal Court in our judgment arrived at a correct conclusion. We would have advised that the appeal be dismissed and the conviction affirmed.

The other point upon which we respectfully differ from the majority judgment is of more significant importance as affecting the interpretation of the Internal Security Act, 1960. All the accused except No. 10 of 1967 were charged with a breach of section 58 of the Internal Security Act, the charge being in the following terms:

> "That you between 2.00 a.m. on September 2 and 11.00 a.m. on September 15, 1964, in a security area, as proclaimed by the Yang Di-Pertuan Agong vide F.L.N. 246 dated August 17, 1964, namely at Kampong Tenang, Labis, in the District of Segamat, in the State of Johore, consorted with members of the Indonesian Armed Forces who carried firearms and ammunitions in contravention of the provisions of section 57 (1) of the Internal Security Act, 1960, in circumstances which raised a reasonable presumption that you intended to act with such members of the Indonesian Armed Forces in a manner prejudicial to public security and that you thereby committed an offence punishable under section 58 (1) of the Internal Security Act No. 18 of 1960."

Section 57 (1) of the Internal Security Act is in the following terms:

> "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 - *(a)* any firearm without lawful authority therefor, or *(b)* any ammunition or explosive without lawful authority therefor, shall be guilty of an offence against this Part and shall be punished with death."

Provision follow for the establishment of "lawful excuse" and "lawful authority." 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 rhetorical question "Why ?" The language of the section is universal and untractable; 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 convention 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 point that the charge was bad in law was taken for the first time in the appellant's case. Neither the trial judge nor the Federal Court had the opportunity of adjudicating upon it. In our view, the point was a bad one; but in any case it would not in our opinion be in accordance with the practice of the board to sustain a point never taken in the courts below, unless the accused has been deprived of a fair trial and there has been a manifest injustice. If the point had been taken before the trial judge, the charge might have been amended or different evidence might have been led to show that the consorting had been also with persons other than the Indonesian Armed Forces or there may have been more explicit evidence as to the operations upon which those forces were engaged. The board is really left in the dark as to what the factual position was in Malaysia at the critical time. Lieutenant Sutikno, the Indonesian officer in charge of the party of Indonesian soldiers and others including the accused, said that the purpose of coming to Malaya was to liberate the people of Malaya from British Imperialism and to do sabotage work in order to crush the economy of Malaya. Although apparently there had been on this occasion an armed conflict between the Indonesian Armed Forces and Malaysian soldiers, centring about their attempted capture, it is not known whether a state of war existed between the two states. If any exception from the generality of section 57 (1) is permissible, these considerations might have had an important bearing on the

question whether the section applied to the Indonesian Forces at the time the accused were collaborating in Johore with them. Owing to the failure of the accused to take the point on the relevancy of the charge a the trial, the matter has been left in doubt. But it is in our view too late to raise it before the board.

We would have advised that the appeals in these cases also be wholly dismissed.