The appellants were tried, convicted and sentenced by the High Court in Singapore on the following charge:-

"That you (1) Stanislaus Krofan (2) Andres Andea, on or about the 14th day of April, 1965, at about 9.20 p.m. at Tanjong Rhu, Singapore, which is a security area, did carry without lawful authority 43 Ibs. of explosives, and thereby committed an offence under section 57(1)(b) and punishable under section 57(1) of the Internal Security Act, 1960."

We propose to set out only those facts which are material for determining the questions raised in this appeal. The appellants on the evening of 14th April 1965 came into Singapore from one of the nearby Indonesian islands in a boat which carried no lights. They came ashore carrying with them explosives which they claimed they had been ordered by their superiors to explode in Singapore. They claimed they were members of the armed forces of Indonesia though at the time of their entry into Singapore they were wearing civilian clothing, They were apprehended without offering any resistance immediately after they set foot on Singapore soil with the explosives in their physical possession. At the material date there was a state of "confrontation" between Indonesia and Malaysia, of which Singapore was a member State. For the purposes of this appeal it is not disputed that as a result of this state of confrontation, Indonesia and Malaysia were in "armed conflict", within the meaning of that expression in the 1949 Geneva Convention relative to the Treatment of Prisoners of War (hereinafter referred to as "the 1949 Geneva Prisoners of War Convention") .

When the trial commenced before Kulasekaram J. on 17th September 1965, Singapore was no longer a member State of Malaysia, having been separated from Malaysia on 9th August 1965.The appellants were represented by counsel at the trial who took a preliminary point that as the appellants claimed to be "prisoners of war, some competent body has to decide whether they are or not"; 'that so far no competent body has given any verdict as to the status whether they are prisoners of war or not" and that "if they are then this court cannot try them." On this point counsel for the prosecution replied to the effect that if the appellants were claiming to be protected prisoners of war within the meaning of the 1949 Geneva Prisoners of War Convention, the case for the prosecution would be that on the facts they did not come within the ambit of its article 4.

Unfortunately this issue was not tried as a preliminary issue and no evidence was led to enable the trial judge to arrive at a decision on it nor apparently did the trial judge rule on it before the trial proceeded with the prosecution calling evidence to support the charge. After the defence had been called upon and both appellants had concluded giving their evidence it would appear from the record that the trial judge was invited, at that late stage, to decide whether or not on the evidence before him the appellants fell within the definition of prisoners of war as defined in article 4 of the 1949 Geneva Prisoners of War Convention. The trial judge however made no definite finding on that issue and after indicating he had doubts as to what their status was, made "no order" to enable their status to be determined by "a competent tribunal" as provided under article 5. The trial judge however stated "Apart from the fact that they may enjoy this protection under the Convention as prisoners of war, the prosecution has abundantly proved the case that the offence has been committed."

Five days later the trial was resumed, it would appear at the request of the prosecution, to clarify the situation which had arisen as the result of the "no order" made by the trial judge and suffice it for us to say that the judge attempted to clarify the situation by adjourning the

trial until the status of the appellants had been determined by "a competent tribunal" as provided under article 5.

The prosecution appealed to the Federal Court against the order of adjournment but the Federal Court held that it had no jurisdiction to hear an appeal against an order of adjournment made by the High Court in the exercise of its original criminal jurisdiction (see [1966] 1 M.L.J. ix).

On 29th April 1966 the adjourned proceedings were resumed and although the prosecution raised a new argument that the 1949 Geneva Prisoners of War Convention was not part of the law of Singapore at the material date even though it was then a member State of Malaysia, the trial judge declined to deal with that argument. He, however, took the unusual course of convicting the appellants on the charge against them on the ground that it was desirable to have finality to the matter. He held that the prosecution had proved its case to his entire satisfaction in respect of both appellants on the charge against them and convicted them. The first question raised in this appeal is whether or not the 1949 Geneva Prisoners of War Convention was part of the domestic law of Singapore on 14th April 1965. The prosecution's argument that it was not part of the law of Singapore at that date is put thus. This Convention was one of four Conventions signed at Geneva on the 12th August 1949 by a large number of States dealing respectively (1) with wounded and sick members of the armed forces in the field; (2) with wounded, sick and shipwrecked members of the armed forces at sea; (3) with treatment of prisoners of war; and (4) with protection of civilian persons in time of war. Singapore and Malaysia were not signatories to these four Conventions as they were not then independent countries.

In July 1957 these Conventions became part of the domestic law of the United Kingdom by virtue of the Geneva Conventions Act, 1957, though the United Kingdom as a signatory state ratified it at a later date in September 1957. In April 1962 these Conventions became part of the domestic law of the then Federation of Malaya by virtue of the Geneva Conventions Act, 1962, though Malaya acceded to it at a later date in 1962. Singapore was then not a member State of the Federation of Malaya.

On 16th September 1963 Singapore with the States comprising the Federation of Malaya and the Borneo States became a member State of Malaysia. Under section 73(2) of the Malaysia Act which was enacted by the Parliament of the Federation of Malaya and which came into force on 16th September 1963 it was provided as follows:-

"73(2) Any present law of the Federation passed or made on or after the day this Act is passed shall extend to any part of Malaysia to which it is expressed to extend; but save as aforesaid no present law of the Federation shall extend to any of the Borneo States or to Singapore, unless or until it is so extended by a law passed or made as aforesaid. "

Section 74 of the Malaysia Act enabled the Yang di-Pertuan Agong by order to extend to Singapore or to declare to be federal law any present law of the Federation of Malaya relating to matters about which Parliament has power to make laws. During the period when Singapore was part of Malaysia no order was promulgated by the Yang di-Pertuan Agong extending the operation of the Geneva Conventions Act 1962 to Singapore.

The position then, so the argument goes, is that unless the 1949 Geneva Conventions were part of the domestic law of Singapore immediately prior to 16th September 1963, they were at

all material times not part of the domestic law of Singapore. They were not part of the domestic law of Singapore immediately prior to 16th September 1963 because, although Her Majesty the Queen of England could under section 8 of the Geneva Conventions Act 1957 by Order in Council direct that any of the provisions of that Act shall extend to any colony, no such Order in Council extending the provisions of that Act to Singapore was ever made.

The facts and circumstances on which this new argument has been based are unusual and unique and in all probability will remain unique. 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 international 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.

On that assumption the next question is whether or not the appellants were prisoners of war within the meaning of article 4 of the 1949 Geneva Prisoners of War Convention. It is not in dispute that on the facts the present appellants are not persons belonging to the category set out in article 4A(2). Counsel for the appellants submitted that they fall within the category set out in article 4A(1) which is in the following terms:-

"ARTICLE 4

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."

The undisputed facts are that the appellants came to Singapore at night in a boat which carried no lights, wearing civilian clothing and carrying explosives with them for the purpose of exploding these explosives in Singapore at a time when there was a state of armed conflict between Indonesia and Malaysia of which Singapore was then a part. On those facts it seems clear, assuming they were members of the armed forces of Indonesia, that they entered Singapore as saboteurs to commit acts of sabotage.

The question therefore, is whether members of the armed forces of a party to the conflict who enter enemy territory dressed in civilian clothing as saboteurs are prisoners of war in the sense of the said Geneva Convention.

When there is a state of war between two or more States, the belligerent States have under international law customarily or by special convention agreed to comply with certain rules or regulations. These rules or the law of nations respecting warfare have their origin in usages, so called "*usus in bello*", and which through custom and treaties or conventions became legal rules.

One of the most important rules of the law of nations respecting warfare for the purposes of this appeal are contained in "Regulations respecting the Laws and Customs of War on Land"

(hereinafter referred to as "the Hague Regulations") agreed upon at the Second Peace Conference of 1907 at The Hague.

The Hague Regulations contain *inter alia* provisions dealing with the status of belligerents, the position of prisoners of war and the position of spies. As will be seen from the preamble these regulations do not aim at giving a complete code of the laws of war on land and cases outside their scope still remain the subject of customary rules and usages. Moreover most of their provisions were declaratory of existing customary international law.

Under article 3 of the Hague Regulations the armed forces of the belligerents in case of capture by the enemy have the right to be treated as prisoners of war. Articles 4 to 20 enacted exhaustive rules regarding their captivity. Many of these rules were merely declaratory of the existing customary principle that prisoners of war should be treated by their captors in the same manner as their own troops.

Under article 29 a spy is defined as a person who acts clandestinely or on false pretences to obtain information in the zone of operations of a belligerent with the intention of communicating it to the hostile party. It goes on to explain that accordingly a soldier not wearing a disguise who has penetrated into the zone of operations of the hostile army for the purpose of obtaining information, is not a spy.

Under articles 30 and 31 a spy taken in the act shall not be punished without previous trial and a spy, who after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war.

The provisions of the Hague Regulations, which we have just referred to, clearly indicate that spies need not on capture be treated as prisoners of war and this is in conformity with existing customary international law and they further clearly indicate that a member of the armed forces who operates out of uniform in the zone of operations of the enemy for the purpose of obtaining information, is considered a spy.

However, the position of members of the armed forces caught out of uniform while acting as saboteurs in enemy territory is not dealt with by the Hague Regulations. In the *Saboteur's Case* (*Ex parte Quirin & Ors.*)(1) the Supreme Court of the U.S.A. in 1942 treated disguised saboteurs as being in the same position as spies. This view is also held by the authors of the *Manual of Military Law* Part III an official publication in 1958 of the United Kingdom War Office at paragraph 96 page 34 where it is stated "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." We are of the opinion that this view does not offend against the rules of the law of nations respecting warfare and indeed states the position under customary international law. It seems to us to be consistent with reason and the necessities of war to treat a regular combatant in disguise who acts as a saboteur as being in the same position as a regular combatant in disguise who acts as a spy. 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. In the case of the "soldier" spy it is universally accepted that he loses his prisoner of war status and need only be treated as any other spy would be treated. There seems no valid reason therefore why a "soldier" saboteur, who by divesting himself of his uniform cannot readily be distinguished from a civilian, should not also be treated as any other saboteur would be treated. Both, by reason of their having purposely divested themselves of the most distinctive characteristic of a soldier, namely his uniform, have

forfeited their right on capture to be treated as other soldiers would be treated i.e. as prisoners of war.

We will now examine the position under the 1949 Geneva Prisoners of War Convention. Under article 4A(1) persons belonging to the category of "members of the armed forces" of a party to the conflict are prisoners of war. Has this definition of prisoners of war altered the position of the "soldier" spy or "soldier" saboteur who has divested himself of his uniform? We are of the opinion it has not. 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. As we have mentioned, the Hague Regulations gave the status of prisoners of war to "members of the armed forces" of the belligerents. The words used in article 4A(1) of the Geneva Convention and article 3 of the Hague Regulations to describe regular combatants are identical namely "members of the armed forces." In our opinion the principle applicable remains the same, namely, that a regular combatant who chooses to divest himself of his most distinctive characteristic, his uniform, for the purpose of spying or of sabotage thereby forfeits his right on capture to be treated as other soldiers would be treated i.e. as a prisoner of war. If such a spy or a saboteur is tried under the domestic legislation of the detaining power such trial can take place in camera, no notification is required to any Protecting Power and no rights of communication under article 107 of the 1949 Geneva Prisoners of War Convention exist. However, he must be treated with humanity and afforded a fair and regular trial.

In the present case the appellants were charged with having committed an offence under the domestic legislation of Singapore, they were represented by counsel at the trial, the trial was conducted in open court before a judge of the High Court in accordance with the rules of procedure applicable. In fact they were accorded the same treatment and trial as anyone else in Singapore would be who is accused of having committed a similar offence.

We are therefore of the opinion that the appellants are not prisoners of war within the meaning of article 4 of the said Geneva Convention and there can be no question that they have not been treated with humanity or not been granted a fair and regular trial.

The only other question raised by the appellants that we need to deal with is the point that there was a miscarriage of justice because the trial judge after holding that there was a doubt as to the status of the appellants nevertheless convicted them in order to have finality on the matter. As the doubt in the mind of the trial judge is only as to the status of the appellants and as, for the reasons we have already set out, we are of the opinion that the appellants on the undisputed facts are not entitled to the status of prisoners of war, we consider that no substantial miscarriage of justice has occurred and accordingly acting under the proviso to section 60 of the Courts of Judicature Act 1964 we dismiss this appeal and affirm the conviction and the sentences.

(1) 317 U.S. 1; 87 Law Ed. 3; [10 *Ann. Dig.* 564.]