Commentary

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It is my honour and privilege to present to you the commentary on the Paper "A Malaysian View on the Traditional Approaches to the Protection of Victims of Armed Conflict and their relationship to Modern International Humanitarian Law", as prepared by Professor Ahmad Ibrahim of the University of Malaya, Malaysia, and just presented by his Deputy, Professor Khalid.

The Paper prepared by Professor Ibrahim is mainly presented in two parts: the first dealing with the legal aspects — namely, referring to the Geneva Conventions and the cases arising from its application; whilst the second or latter part provides excerpts from the Holy Koran which are relevant to and in support of the Malaysian view — particularly the Muslim Malays — on the traditional approach to the views of armed conflict and their relationship to modern International Humanitarian Law.

In my commentary I have opted to reverse the order, speaking first to the traditions forming or influencing the Malaysian people; and then referring to the legal provisions prevailing in the country. Finally, I shall raise some questions in the guise of conclusions which, I hope, will stimulate discussion.

Now, in speaking to the traditions influencing the Malaysian people, it must be remembered that the Malaysian people are mainly composed of Malays, Chinese and Indians. You will certainly have noticed that the Muslim Malay view has been very well presented by Professor Ahmad Ibrahim in his paper. There is however mention in the last page, i.e. page 233, last paragraph, of the practice of other religions in Malaysia while noting that Islam is the religion of the Federation.

I am of the opinion that it is more the Chinese and Indian civilizations that influence the Chinese and Indian communities, both Buddhism and Hinduism — however being closely and totally interwoven in the said civilizations.

Since the programme of the Seminar provides for the presentation of the Chinese and Indian views, I shall touch on them only lightly and briefly, just in order to ensure an understanding of the background or basis for the Malaysian view.

Professor Zhu has in his paper explained admirably the historical background of the Chinese view and the philosophy governing it. May I be permitted to add that, as a general rule, the Ju philosophy, known in western literature as Confucianism because it had its beginning in the teachings of Confucius (551–479 BC), founder of the Ju school, has long been dominant in Chinese thought. The place it has occupied is comparable to that of religion in other countries, so much so that the question often arises whether Confucianism is a religion. Confucianism, as is generally asserted, is not a religion, for it has no religious structure or sanction and suffers from its silence about the realm beyond

life. Nevertheless, Confucianism though not a religion is akin to religion in some of its features; its notable ethical teachings whether moral, political, or social have permeated Chinese life in all its aspects which involve a concern for the whole of humanity, its sufferings and its well being. This is how the Chinese people derive religious comfort from Confucianism, although, in terms of significant influence upon Chinese thought, there are four main systems of Chinese philosophy: Confucianism, Taoism, Mohism and Legalism, all characterized as man-centred and world-centred, and preoccupied in seeking to establish "a better world". They all originated between the sixth and third century BC when old institutions and order had lost their value.

In ethics, Confucianism upholds the five "constant virtues" of *jen* (human heartedness), *yi* (righteousness), *li* (propriety), *chih* (wisdom) and *hsia* (sincerity or good faith). In politics it stresses the moral importance of human relationships. In the Confucian principles and values, we can still find an inexhaustible store of wisdom and a useful set of rules for right living which could readily lead to the modern concepts of human rights and political democracy, although much in the passage of time has suffered at the hands of Emperors and recently politicians who stressed that aspect of Confucianism which supports autocratic rule!

For the last two thousand years Confucianism has dominated Chinese thought and moulded its character. It has also given continuity to the old civilization of China which, far from becoming extinct in its development, shows a vitality in its struggle for survival, the significance lying in its moderation, harmony and synthesis — its "spirit of human reasonableness".

Above all, Confucianism is a blend of idealism and realism. It is metaphysical and ethical. It attaches importance to spiritual cultivation and yet has a deep concern for "order in the world". Despite its vast scope and great depth, it appears yet to be simple and direct. It has a flexibility and versatility and yet forms a single thread of unity: one main tradition, one main stream of thought, always having as its goal a particular kind of highest life. In order to illustrate this, may I be permitted to quote a couple of examples from the sayings of Confucius on ethics which I think are relevant to our theme: The Master was asked: "Is there one word which may serve as a rule of practice for all one's life?" The Master said: "Is not reciprocity such a word? What you do not want done to yourself, do not do to others". Again, when asked "What do you say concerning the principle that injury should be returned with kindness?", the Master said: "With what, then, will you recompense kindness? Recompense injury with justice, and recompense kindness with kindness".

Now, regarding the Indian civilization that influences the Indian Malaysians, you have the well documented paper prepared by Professor Penna, so I shall not dwell on it in any great detail. However, I would just like to mention here that the great epic, the *Mahabharata* which was composed several thousand years ago, permeates and binds together as one people the vast numbers of the Indian community despite caste, creed and language that seemingly divide them. The *Mahabharata* is one of the noblest heritages: its elevating influence strengthens the soul and drives home — as nothing else does — the vanity of ambition and the evil and futility of anger and hatred. The *Mahabharata* discloses a rich civilization and a highly evolved society which, though of an older world,

strongly relates to the Malaysian Indians today with the same values and ideals. We learn in the epic that the art of war was highly developed and military prowess and skill were held in high esteem. We read in the *Mahabharata* of standardised phalanxes and of various tactical movements. There was an accepted code of honourable warfare, deviations from which met with reproof among the Ksatriyas. The advent of the Kali age is marked by many breaches of these conventions in the famous Kurukshetra battle, on account of the bitterness of conflict, frustrations and bereavements. Some of the most impressive passages in the scripture centre around these breaches of the *Dharma.*

The *Mahabharata* has moulded the character and civilization of one of the most numerous of the world's people — by its gospel of *Dharma,* which like a golden thread runs through all the complex movements in the epic; by its lesson that hatred breeds hatred, that covetousness and violence lead invariably to ruin, that the only real conquest is in the battle against one's own lower nature.

I feel I should also mention a few words here on the Emperor Asoka and his Moral System.

Asoka was the son of Emperor Chandragupta. The system of government was one of absolute monarchy based on a huge standing army covering a territory almost the size of British India including the South Tamil Nadu below Madras and excluding Ceylon. The Capital was called Patalipatra (today's Patna). Asoka's army counted some 600,000 infantry and 130,000 cavalry, 9,000 elephants attended by 36,000 men, and many thousands of chariots.

With his huge force, Asoka's power in India was supreme, and, in the 13th year of his reign, he conquered the Kalingas. There was a huge loss of life and innumerable missing caused by the conquest: 150,000 carried away captive, 100,000 slain, and many times that number injured. This is given in Rock Edict XIII called "The Conquest Edict", published circa 257 B.C.

The Kalinga war experience seems to have gradually changed the life and outlook of Emperor Asoka and led to the establishment and enforcement of his "Law of Piety" during the rest of his reign throughout the whole of India and his sending of missions as far as Europe, and other neighbouring States such as Ceylon.

The Law of Piety was a severe practical moral code which the Emperor enforced throughout his Empire and he chose to publish it by carvings on rock faces and on polished sandstone columns along the highways and places sacred to the memory of the Lord Buddha. The evidence of his moral code is found in Asoka's inscriptions, commonly referred to as rock edicts, minor rock edicts, Kalina Edicts, pillar edicts, and minor pillar edicts.

In his "Conquest of Kalinga Edict" Emperor Asoka states that maltreatment is to stop and imprisonment and torture to be only for just cause. It is clear from the Edicts that Asoka went to great pains to ensure that his officials carried out his "Law of Piety" and he threatened them with displeasure should they fail. And it was Asoka who elevated Buddhism from a sect in India to one of the great religions of the world.

Now, referring to the legal aspects of the protection of victims of armed conflict and the Malaysian view, it is noted that the Geneva Conventions were acceded to by Malaysia in 1962. It has so far not acceded to the Protocols of 1977.

Section 3 of the Geneva Convetion Act of 1962 provides for sanctions in the event of grave breach of any of the Geneva Conventions, referred to in Articles 50, 51, 130 and 167 of the First, Second, Third and Fourth Conventions, respectively. The interesting feature is that according to this Article 3 of the said Geneva Convention Act of 1962, "any person whatever his citizenship or nationality who whether inside or outside the Federation commits or aids, abets or procures the commission by any person of any such grave breach shall be guilty of an offence and on conviction thereof shall be sentenced to imprisonment for life for wilful killing of a person protected by the Convention or imprisonment for a term not exceeding 16 years in case of any other breach".

As regards judicial proceedings referred to in Articles 99–108 of the Third Convention, they are embodied in Articles 4–7 of the Malaysian Act of 1962 and provide among other things for the accused to be represented by counsel, for a right of appeal and for custody procedures.

As regards the application of the Geneva Conventions, a couple of important cases have been cited. I shall not go into the details but I would just review briefly the main cases and the decisions.

With reference to the case of *Stanislaus Krofan & Another* v *Public Prosecutor* ([1967 1 MLJ] 133) the questions were raised whether:

1. the 1949 Geneva Convention Relative to the Treatment of Prisoners of War was part of the domestic law in Singapore; and
2. whether the appellants were prisoners of war within the meaning of the Convention because they were in civilian clothes at the time of capture.

The Federal Court held that:

1. as the question of the applicability of the Geneva Conventions was raised at a very late stage of the proceedings the court would decline to decide it and would assume that they were applicable to Singapore at all material times;
2. a regular combatant who chooses to divest himself of his most distinctive characteristic, his uniform, for the purposes of spying or of sabotage thereby forfeits his right on capture to be treated as a prisoner of war; and
3. the appellants in the case had forfeited their rights to be treated as prisoners of war and therefore were rightly tried and convicted.

In the case of *Public Prosecutor* v *Oie Hee Koi and Associated Appeals* ([1968 1 MLJ 148]), the accused in these cases were Malaysian Chinese, born or settled in Malaysia, but whose nationality had not been proved. They were all captured during the Indonesian confrontation campaign against Malaysia, having landed and infiltrated into Malaysian territory either by boat or parachuting. They were armed and accompanied by Indonesian military personnel.

The Privy Council held (Lord Guest and Sir Garfield Barwick dissenting) that:

1. the Geneva Convention does not extend the protection given to prisoners of war to nationals of the detaining power. The same principle applies to persons who, though not nationals of, owe a duty of allegience to, the detaining power;
2. the Geneva Convention had not changed or abrogated customary international law on this question;
3. no question of mis-trial exists where the accused did not raise a doubt whether they were entitled to treatment as protected prisoners of war and

where no claim had been made to provide any basis for the court to apply; no burden lay on the prosecution, but the onus was on the accused to prove that they were so entitled; and

4. the convictions under section 58 of the Internal Security Act cannot stand where the persons whom the accused were alleged to have consorted with were Indonesian soldiers. Members of regular forces fighting in enemy country are not subject to the domestic criminal law. The Internal Security Act is part of the domestic law and not directed at the military forces of a hostile power attacking Malaysia.

Per Lord Guest and Sir Garfield Barwick (dissenting): there is no rule of international law which suggests that the national laws may not be applied to armed forces of an enemy which invade the national territory. The Convention itself set the only limitation upon the operation of 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 place procedural limitations on their trial.

Having reviewed briefly the relevant cases and decisions there are a few questions that should perhaps be considered.

Firstly — it would appear that despite the admitted practice in the common law prevalent in Malaysia, the *onus* is on the accused to prove that they are entitled to protection under the Convention. Should it not be for the prosecution to show that they are not so entitled?

Secondly — the application of national laws to forces of an enemy which invade national territory. As Captain Tom Holden has so clearly expressed in his stimulating presentation, this situation unfortunately prevails under what may be termed "status prisoners" where saboteurs are regarded *ab initio* as belligerents who are *not* entitled to a Prisoner of War status or treatment, relieving the detaining power of considering those arrested in civilian clothes as prisoners of war and they are tried as having violated the local laws!

Thirdly — a point that is not covered in Professor Ibrahim's paper and which I consider important is the *protection of refugees* (who arrive in Malaysia) *following armed conflict in the region.*

Now, when one considers these questions in the light of the civilization of the Malaysian people which forms the basis of the traditional approach in all day to day matters, one does note a gap between the known and acknowledged background, civilization and culture of the people on the one hand, and the humanitarian legislation in existence and its application on the other. Certainly the interest of the Nation must be paramount, but, one wonders whether the gap cannot be narrowed . . . Perhaps a more aggressive approach to the dissemination of the principles of International Humanitarian Law, drawing parallels with and from the civilization of the people could hopefully create a moral force that would ensure an influence on local legislation and application of International Humanitarian Law more adapted to the context in which it is applied. I am sure your knowledge and experience could shed more light towards finding solutions.